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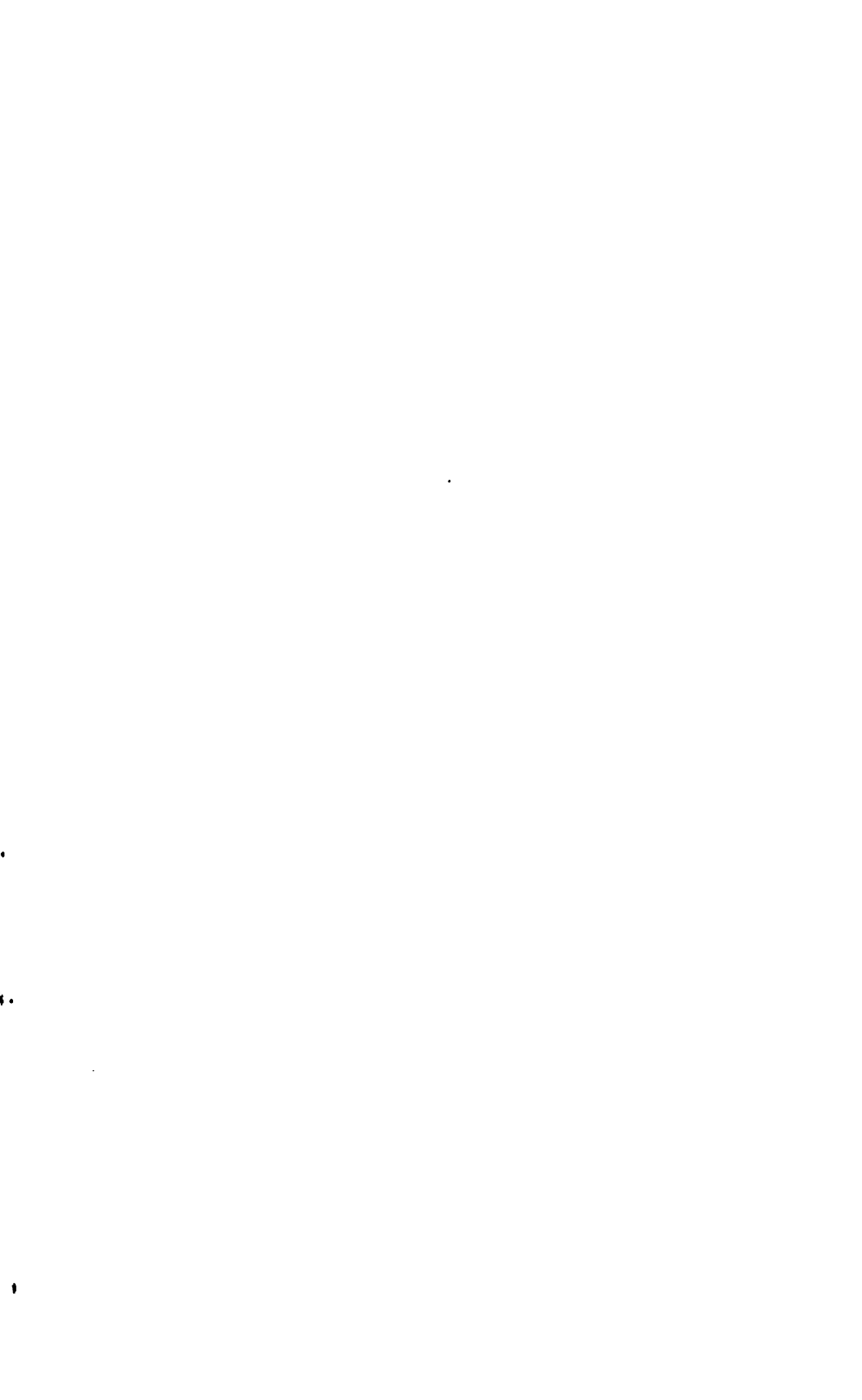
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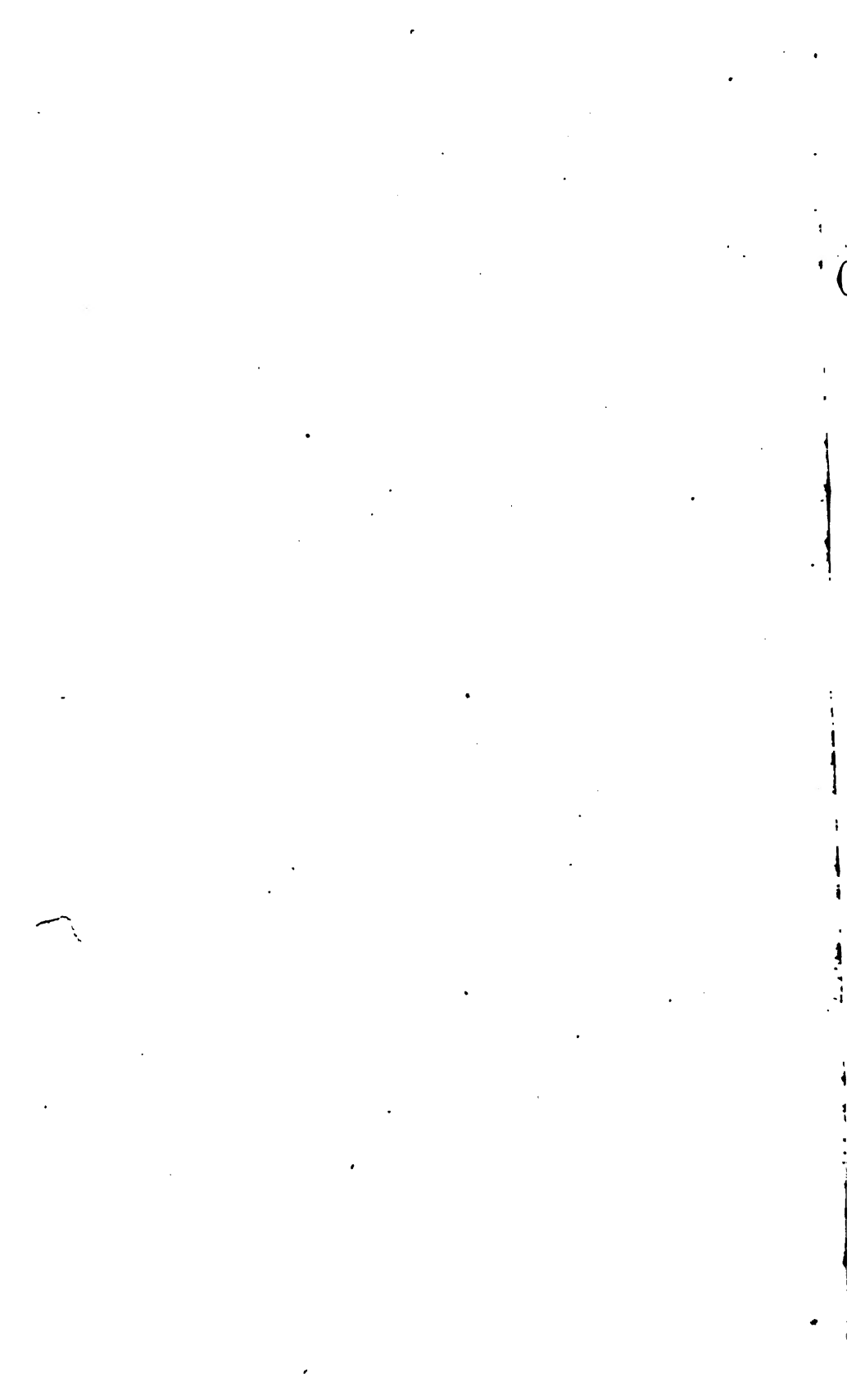
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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF JUNE 5, TO AND INCLUDING
DECISIONS OF NOVEMBER 27, 1894.

WITH

NOTES, REFERENCES AND INDEX.

By H. E. SICKELS,
STATE REPORTER.

VOLUME CXLIII.

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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
COMMENCING JUNE 3, 1894.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK, Respondent, v. THE MANHATTAN RAILWAY
COMPANY, Appellant.

143 1
77 AD 32

Under the provision of the act of 1867 (Chap. 489, Laws of 1867) providing "for the construction of an experimental line of railway in the counties of New York and Westchester," which act authorized the W. S. & Y. P. R. Co. to construct an elevated railroad on the route therein specified, and provides (§ 9) that said company shall pay into the city of New York as a compensation for the use of its streets "five per cent of the net income of said railway" derived from passenger traffic, in such manner as the legislature may thereafter direct, the city was given no power to collect the specified percentage under then existing general laws, and until future legislation fixing the manner of payment the company could not be placed in default for refusal to make payment.

Mayor, etc., v. T. T. S. R. Co. (118 N. Y. 311), distinguished.

The act of 1868 (Chap. 855, Laws of 1868) entitled "An act supplementary to chapter 489, Laws of 1867, and to provide for the collection and application of revenue in the county of New York in certain cases," is invalid as it is violative of the provision of the Constitution (Art. 8, § 16) requiring that a private or local bill shall embrace but one subject which shall be expressed in its title.

The different parts of said act are so interwoven and dependent one upon the other, that no portion thereof can be upheld after striking out the balance. The provisions, therefore, of said act which give direction as to the manner of payment of the percentage specified in the act of 1867, fall with it, and standing alone, may not be referred to as the directions called for by said last-mentioned act.

Where, however, it appeared that the corporation named in said act of 1868 availed itself of the extended time given to it by the act in which to construct an experimental section, and after such section had been approved as prescribed, proceeded to construct the railroad along the route provided for in the act of 1867, with another form of motor, however, than that authorized by said act, as permitted by the act of 1868 (§ 1), and also availed itself of the permission given by said act to change its name (§ 5), and executed the bond required by it (§ 3); also that all the rights, powers, privileges and franchises of said company were sold on foreclosure of certain mortgages executed by it and the N. Y. E. R. R. Co. became vested therewith, and continued the construction and operation of the road; that the original company paid the five per cent in the manner prescribed by the act of 1868, and said N. Y. E. R. Co. after it acquired title also paid the same down to the passage of the act of 1875 (Chap. 595, Laws of 1875), which confirmed it in the possession and enjoyment of the property purchased, and gave to it certain other rights and privileges, and continued so to do thereafter until it leased the road to defendant, and that defendant continued to make payments of what it claimed to be five per cent of the rental, down to the commencement of this action for an accounting, *held*, that by virtue of these various acts on the part of defendant and its predecessors, and its acceptance of subsequent legislation based on the assumed validity of the act of 1868, there was a waiver of the defense that said act was unconstitutional.

A corporation as well as an individual may waive a constitutional or statutory provision in its favor or for its protection where it is exclusively a matter of private right and no consideration of public morals are involved, and having once done so it cannot subsequently invoke the protection of the provision.

Although said constitutional provision is of a public nature, where an act violative thereof is passed, bearing upon the private rights of individuals or corporations, the constitutional provision becomes as to them one enacted for their benefit, and they may waive the benefit thereof and consent to perform or submit to the requirements of the act, and when once such waiver has been made and consent so given, and the party waiving and consenting has taken benefits granted by the act, such party is forever concluded thereby.

Under the provision of the Rapid Transit Act (§ 36, chap. 606, Laws of 1875), authorizing an elevated railway company, whose railway was then in operation, to construct connections with other railways, railroad depots or ferries, upon routes fixed by the commissioners, upon compliance with "the requirements and conditions imposed by said commissioners," the N. Y. E. R. Co., plaintiffs' lessor, constructed an extension of its route on the east side of the city, known as "the Third Avenue line," connecting with various ferries and railroads, upon routes fixed by the commissioners, and it and defendant have since operated

the same and have paid what was claimed by them to be the percentage upon the income derived from the passenger traffic thereon. Said commissioners exacted from the N. Y. E. R. Co., as a condition precedent to their laying out any connecting routes, an agreement and consent to certain conditions imposed by them. *Held* (ANDREWS, Ch. J., GRAY and BARTLETT, JJ., dissenting), that as to such line no liability to pay said percentage existed; that the words of said provision of the Rapid Transit Act, permitting the construction of the connecting routes, "with all the privileges and with like effect as though the same had been a part of the original route," are simply a grant of power, upon conditions imposed by the commissioners, and do not carry with them the burdens imposed as to the original route; that defendant was not estopped from denying liability because of the payments previously made by it, and in the absence of some statutory liability, such as exists as to the original route under the act of 1867, it was not obliged to pay the percentage in future.

Mayor, etc., v. T. T. S. R. Co. (113 N. Y. 311), distinguished.

Defendant set up as counterclaims sums paid by it as damages to abutting owners. *Held*, that there was no warranty in regard to the free use of the streets as against abutting owners, and so the counterclaims were not allowable.

Also *held*, defendant was not entitled to recover back the sums paid by it as percentage; that the payments were voluntary and plaintiff was entitled to retain the same.

(Argued February 5, 1894; decided June 5, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 6, 1893, which denied a motion by defendant for a new trial.

This is an action in the nature of one for an accounting. The plaintiff demands judgment against the defendant that it render an account to the plaintiff of its net income arising from passenger traffic on its railroads since the 5th day of June, 1879, and that it pay to the plaintiff five per cent thereon from October 1, 1879, after crediting defendant with the amounts of the quarterly payments actually made by it since that date. The defendant denies any liability to pay any amount whatever, and it also sets up various counterclaims for which it demands judgment. The controversy arises respecting what are termed the Ninth avenue and Greenwich street route,

and also the Third avenue route of railroads operated by defendant in the city of New York. The former is a route on the west side of the city and runs near the borders of the Hudson river, and extends from Battery place on the south to Fifty-ninth street on the north. The latter, or the Third avenue, is an east side route, and the structure thereon was built subsequent to that upon the west side and under a different statute, and for the purpose of forming a connecting route between the Ninth Avenue and Greenwich Street railroad and other steam railways, or the depots thereof, or with steam ferries, pursuant to the thirty-sixth section of what is known as the Rapid Transit Act, being chapter 606 of the Laws of 1875. The railroad that was built upon the east or Third avenue side of the city and in accordance with the routes laid out for it under the act last cited, extends from a connecting point with the Ninth avenue road at the intersection of Greenwich street and Battery place, and thence, after connecting with the South ferry, Hamilton avenue ferry and Staten Island ferry, proceeds northerly through various streets until it reaches Third avenue, and in its progress through these streets and along that avenue towards its terminus at Harlem bridge, it connects with various other ferries across the East river, and also with the Grand Central railroad station at Forty-second street.

The questions arising in the case depend upon various statutes relating to these elevated railroads, and as they are frequently referred to both in the arguments of counsel and in the opinion of the court, it is thought to be matter of convenience to set them out in this statement as fully as may be necessary to a proper understanding of the case. The first act upon the subject was passed April 20, 1866, and forms chapter 697 of the laws of that year. It is an act supplementary to what is commonly known as the General Railroad Act of 1850. It is not necessary to give the text in full, it being sufficient to say that it provided for the formation of a railroad company under the provisions of the act of 1850, and for the purpose of carrying persons and property by means of a propelling rope or cable attached to stationary power. The rate

of fare was fixed at a minimum of ten cents, with a right to not exceeding five cents for each mile, or any portion thereof. Under this act of 1866 the West Side and Yonkers Patent Railroad Company was duly incorporated for the purpose of constructing, maintaining and operating a railway for public use, and for the transportation of persons and property by the means spoken of in the act. The railway was to commence at or near the southerly extremity of the city of New York, and was to extend thence northerly, with one or more branches, parallel or lateral to the main line through the city to the village of Yonkers. The articles of association of this company were duly filed in the office of the secretary of state July 26, 1866. Nothing further had been done under the provisions of this act when chapter 489 of the Laws of 1867 was passed. That act is entitled "An act to provide for the construction of an experimental line of railway in the counties of New York and Westchester." The first section of that act authorized the West Side and Yonkers Patent Railway Company to commence and proceed with the construction of the elevated (so-called) railway, in the counties of New York and Westchester, in the manner and upon the route hereafter specified. The second section provided that the railway should be operated exclusively by means of propelling cables attached to stationary engines placed beneath or beyond the surface of any street through which such railway might pass, and was to be concealed from view, so far as the same might be detrimental to ordinary uses of said street, and provision was made for the kind of structure that was to be built. The third, fourth and fifth sections of that act read as follows :

"§ 3. The said West Side and Yonkers Patent Railway Company are hereby empowered to commence the construction of an elevated railway as aforesaid, at the southerly extremity of Greenwich street, near Battery place, in the city of New York, and extend the same northerly along Greenwich street for a distance of half a mile in length. At or near the center of the same shall be placed a stationary engine, which shall be constructed to operate a series of two lengths of propelling

cable, extending about one-fourth of a mile northerly, and one-fourth of a mile southerly, and put the same in practical operation as contemplated by said company, with a car placed upon said track, loaded to a weight equal to at least three times the ordinary weight of a passenger car proposed to be used thereon with its occupants. When the said experimental section shall be in readiness within ————— the time hereinafter mentioned, the commissioners hereinafter mentioned shall proceed to inspect the said railroad, its structures and operating machinery. Upon due inspection and examination as aforesaid, if the said commissioners shall approve of the structure, plan and operations of the said elevated railway, and shall find that the same can be operated with safety and dispatch, then the said commissioners shall certify to such facts, and shall cause a copy of their certificate of approval to be signed in duplicate, and one copy sent to the governor of the state, who, upon approving the same, shall cause it to be filed in the office of the secretary of state, and a certified copy to be transmitted to the mayor of the city of New York, and thereupon the said West Side and Yonkers Patent Railway Company shall be authorized to extend the line of said railway northerly, as hereinafter provided. But in case the said commissioners shall not approve of said railway, and its plan of construction and operation, they shall, in like manner, sign a certificate of the facts, with an order for the removal of the said railway indorsed thereon, which shall be sent to the governor, and when approved by him, shall be filed with the secretary of state, and a certified copy sent to the mayor of the city of New York, and thereupon the constructing company shall proceed immediately to remove the structure, and shall replace the streets and sidewalks in the same condition as before its erection, and in default of so doing the corporate authorities of the city of New York may cause the same to be done at the expense of the said company.

“§ 4. Upon the compliance of the West Side and Yonkers Patent Railroad Company with the requirement of the preceding sections of this act, and upon the filing of the certifi-

cate of the commissioners approved as aforesaid, in proof of the same, the said company is hereby authorized to extend its line of elevated (so-called) railway as aforesaid, along both sides of Greenwich street to Ninth avenue, and along both sides of Ninth avenue, or streets west of Ninth avenue to the Harlem river.

"§ 5. There shall be three commissioners, of whom two shall be appointed by and continued during the pleasure of the governor, and one by the Croton aqueduct board of the city of New York, whose duty it shall be to cause the inspection of said railway, and filing of certificates thereof, as hereinafter mentioned, and who shall have power, in case of the extension of the line of railway, as specified, to authorize the constructing company to remove any obstructions which may exist along its route, and to direct as to the removal and replacement of awning frames, signs and other local objects, heretofore permitted in the streets along which such railway is to pass. They may designate the point at which staircases may be erected for public access in the streets, to such railway, and where "turn-outs" and connecting tracks between the two tracks along the street may be erected. The said commissioners may also limit the speed to a maximum rate compatible with public safety, at which cars may be propelled upon said railway and may prohibit the erection of any structure in the public streets by said constructing company, which shall be unsafe or unauthorized by this act. Their compensation shall be paid by said company, at the rate of ten dollars per each day of such official service, as sworn to by them, and approved by the governor. A majority of said commissioners shall be competent to act in all cases."

The sixth section is not important. The seventh, eighth, ninth, tenth and eleventh sections read as follows :

"§ 7. It shall be lawful for said constructing company to rent, purchase, or acquire, such buildings or parts thereof as may be convenient for the stations or depots for public access to the contemplated railway, and to hold such real estate and personal property as may be deemed desirable in the location

of the aforesaid route and prosecution of the business connected with such railway, but shall be subject to the liabilities and enjoy the privileges mentioned in the acts before mentioned, granting corporative powers not inconsistent with the provisions of this act, and any private property used or acquired, shall be compensated for by said company under provisions of existing laws, authorizing the formation of railroad companies, and the acquisition of rights of way therefor. The said company may connect with its track upon the northern side of the Harlem river by means of a steam ferry or otherwise, in such manner as the commissioners aforesaid may approve.

“§ 8. The said company shall be authorized to demand and receive from each passenger within the limits of the city of New York, rates of fare not exceeding for any distance less than two miles, five cents; for every mile or fractional part of a mile in addition thereto, one cent. Provided, that when said railway is completed and in operation between Battery place and the vicinity of the Harlem river, the said company may, at its option, adopt a uniform rate not exceeding ten cents for all distances upon Manhattan Island, and may also collect said last-named rate for a period of five years from and after the passage of this act.

“§ 9. The said company shall pay a sum of five per cent of the net income of said railway from passenger traffic upon Manhattan Island, as aforesaid, into the treasury of the city of New York, in such manner as the legislature may hereafter direct, as a compensation to the corporation thereof, for the use of the streets thereof.

“§ 10. The said company shall construct the experimental section herein mentioned within one year from the passage of this act (legal delays excepted), and shall complete the extension thereof as authorized herein, so far as comprised in the limits of the city of New York, within five years thereafter.

“§ 11. The said company shall be liable for, and shall pay all damages which may result to private property, or the owners thereof, by reason of the construction of said road, and before

entering upon the construction of said road beyond the said experimental section of one-half mile, the said company shall file with the comptroller of the state of New York, their bond, with sufficient surety, to be approved by the governor, in the penal sum of five hundred thousand dollars, conditioned for the payment of all such damages as may result from the construction of such road, and for the removal of said railway in the event that the aforesaid commissioners shall so direct, provided that all applications for injunctions in any matter relating to said railway shall be made only to the Supreme Court of this state."

The company did not comply with section 10 of the act of 1867, by finishing the construction of the experimental section mentioned in that act, within one year from its passage. Then, by chapter 855 of the Laws of 1868, it was enacted as follows:

"AN ACT SUPPLEMENTARY TO CHAPTER 489 OF THE LAWS OF 1868, AND TO PROVIDE FOR THE COLLECTION AND APPLICATION OF REVENUE IN THE COUNTY OF NEW YORK, IN CERTAIN CASES.

"PASSED June 3, 1868.

"The People of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. The time in which the constructing company referred to in section 10 of chapter 489 of the Laws of 1867, entitled an 'Act to provide for the construction of an experimental line of railway in the counties of New York and Westchester,' passed April 22, 1867, to which this act is supplementary, is limited to construct the experimental section and extension thereof, is in addition to the exceptions named, hereby extended six months, and it shall be lawful for experiments to be made, and different forms of application of the propelling cable, or other motor upon such railway, and for the constructing company to adopt such form of motor as the commissioners shall, after due experiment, recommend or approve; and, also, to erect such necessary boiler flues on the line of railway, as shall be approved by the commissioners aforesaid.

"§ 2. In pursuance of section nine of the act aforesaid, it is hereby directed that the said construction company, or its successors, shall, in the month of January in each year, and quarter-annually thereafter, pay to the comptroller of the city of New York, five per cent of its net income, for the purpose of being expended in the improvement of the condition or appearance of the streets, or parts of streets or avenues, or places through which said railway shall be constructed; by preserving or transplanting shade trees, or by other embellishments or improvements of awnings and sidewalk structures which may tend to render the general condition and appearance of the streets aforesaid satisfactory to the citizens dwelling in or frequenting the same. To this end the commissioners aforesaid shall have power to expend revenues received from the specified percentage in such manner as they shall deem best to promote the object aforesaid, subject to the official approval of the mayor of the city of New York. The comptroller of said city is hereby directed to keep said revenue distinct and apart from all other funds; and to pay out of it warrants when signed by the commissioners, and accompanied by vouchers for the expenditures indorsed as approved by the mayor; and the vouchers for the compensation of the commissioners, when approved by the governor, shall also be paid from the same fund in like manner. The vouchers aforesaid shall be filed and remain open to public inspection, the same as if for other public expenditures.

"§ 3. It shall be the duty of the constructing company aforesaid, before opening its railway to public use, to file with the comptroller of the city of New York, in form to be approved by the mayor of the city of New York, its bond in the penal sum of \$100,000, conditioned upon the true and faithful payment of the revenue, in amount and manner specified in the preceding section, and the payment thereof shall be the legal compensation in full for the use and occupancy of the streets by said railway as provided by law, and shall constitute an agreement in the nature of a contract between said city and constructing company, entitling the latter or its successors to

the privileges and rates of fare heretofore or herein legalized, which shall not be changed without the mutual consent of the parties thereto as aforesaid; and the mayor, in behalf of said city, may, in case of any default in payment as aforesaid, sue for and collect at law any arrearages in such payment, and the claims of the city therefor shall constitute a lien on the railway of said company, having priority over all others. *Provided*, That it shall not be lawful for the corporate or other authorities to authorize or permit any structures or thing which, by crossing or overhanging the track of such elevated railway or otherwise, shall impede or endanger its use for its public transit purposes.

"§ 4. The compensation mentioned in the preceding section shall be considered as covering all claims for removal of obstruction or structures found upon the street line of said railway, owned by companies or individuals, and where awnings or other structures are thus removed, they shall be replaced only on permit of the commissioners, under such general rules and regulations as they shall adopt in the plans for improving the condition or appearance of the streets as aforesaid; provided that where vaults have been placed beneath the surface of the streets by owners of adjoining property, under permit of corporate authorities, and the payment of a consideration to the city for such privilege, in such cases and not otherwise, the constructing company shall pay the actual cost of the improvements made as aforesaid, before occupancy, or in *pro rata* proportion for any part thereof; provided, also, that injunctions issuable against said company under provisions of section 11 of the act aforesaid shall be upon notice, and preliminary hearing in legal form and not otherwise.

"§ 5. The said West Side and Yonkers Patent Railway Company may, before further extensions, or the issuance of its stock or securities, file supplementary articles of association in the office of the secretary of state, for the purpose of amending its corporate name, or title, and it shall be known by the amended name, or title, stated in supplementary

articles aforesaid, when signed by a majority of the original corporators and attested by the signatures of its president and secretary, under its corporate seal, without prejudice to its rights, franchises or contracts, to the same effect, as if the amended name had been adopted in the original articles, and referred to by law.

“§ 6. The legislature may, at any time, alter, modify or repeal this act.

“§ 7. This act shall take effect immediately.”

The commissioners provided by section 5 of the Laws of 1867, to be appointed by the governor and the Croton aqueduct board of the city of New York, had been duly appointed, and in 1868 had inspected and examined the experimental line of railway as authorized by the act of 1867 and made their certificate in writing that they approved of the structure, plan and operation of the railroad. This certificate was approved by the governor on the 2d of July, 1868, and filed in the office of the secretary of state. This experimental line was then proceeded with and its construction extended north through Greenwich street and Ninth avenue to Thirtieth street, where it connected with the Hudson River railroad, and no further construction was proceeded with thereafter for nearly ten years.

The New York Elevated Railroad Company, having been incorporated under the General Railroad Act of 1850, for the purpose of constructing and operating a railroad from the Battery in the city of New York, upon a line through the westerly part of the city to Westchester county, purchased, on the foreclosure and sale of the property of the West Side Company above mentioned, all the rights, powers, privileges and franchises which had belonged to and were vested in and held and enjoyed by that company, and more particularly specified in the judgments of foreclosure entered in New York on the 22d of August and 8th of September, 1871, respectively. The conveyances and transfers were duly made pursuant to the judgment of sale to the New York Elevated

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Railroad Company. Soon after this sale the company commenced to operate the railroad from Battery place along Greenwich street and Ninth avenue to Thirtieth street, and it was operating such road under and by virtue of these transfers of the rights, property and franchises of the old West Side road to it, when the two acts of June 17 and June 18, 1875, were passed.

Chapter 595 of the Laws of 1875, passed June seven-teenth, is as follows :

"AN ACT TO AUTHORIZE AND REQUIRE THE NEW YORK ELEVATED RAILROAD COMPANY TO CONTINUE AND COMPLETE ITS RAILROAD IN THE CITY OF NEW YORK, AND TO REGULATE THE CONSTRUCTION, OPERATION AND MANAGEMENT THEREON.

" PASSED June 17, 1875.

" The People of the State of New York, represented in Senate and Assembly, do enact as follows :

" SECTION 1. The New York Elevated Railroad Company, organized, incorporated and existing under and by virtue of the provisions of an act of the legislature of this state, entitled 'An act to authorize the formation of railroad corporations, and to regulate the same,' passed April second, eighteen hundred and fifty, and the laws amendatory, and in addition thereto, having acquired by purchase under mortgage foreclosure and sale, and other transfer, all the rights, powers, privileges, and franchises, which were conferred upon 'The West Side and Yonkers Patent Railway Company,' in and by an act of the legislature of the state, entitled 'An act to provide for the construction of an experimental line of railway, in the counties of New York and Westchester,' passed April twenty-second, eighteen hundred and sixty-seven ; and in and by an act entitled 'An act supplementary to chapter four hundred and eighty-nine of the laws of eighteen hundred and sixty-seven, and to provide for the collection of revenue in the county of New York, in certain cases,' passed June third, eighteen hundred and sixty-eight, is hereby confirmed in the possession and enjoyment of the said rights, powers, privileges, and franchises, as fully and at large as they were so

granted, in and by the acts aforesaid, to the said 'West Side and Yonkers Patent Railway Company,' provided always that nothing herein contained shall impair any legal or equitable rights or remedies remaining in said West Side and Yonkers Patent Railway Company, or any stockholder, or creditor thereof.

"§ 2. The said New York Elevated Railroad Company is hereby authorized and required to construct and complete at least one track, with turn-outs, and side tracks, of its elevated railroads, at any time within five years after the passage of this act (unless delayed by legal proceedings or some authority beyond the control of the company), along and over the streets and places specified and permitted in the aforementioned acts in the mode, manner and form prescribed by said acts, except as herein otherwise provided.

"§ 3. The commissioners appointed under and by virtue of the provisions of the aforesaid 'An act to provide for the construction of an experimental line of railway in the counties of New York and Westchester,' are hereby continued with the same authority, powers and duties in respect to the said New York Elevated Railroad Company as are in, and by said acts hereinbefore mentioned, conferred upon them in respect to the said 'West Side and Yonkers Patent Railway Company.' All vacancies occurring in said commission by death, resignation or otherwise, shall be filled by the governor. The compensation of the commissioners shall be ten dollars each, for each day's service, to be paid by said company on proper vouchers rendered.

"§ 4. The said New York Elevated Railroad Company may make and adopt such alterations and improvements in the structure, rolling stock, motor power and its application, and in the position, grade, elevation and depression of the tracks and the mode of securing and strengthening its said railroads, sideways, crossings, stations and turn-outs as the said commissioners, or a majority of them, may authorize or approve; except that on places south of Ninety-ninth street the track shall not be less than fourteen feet above the surface of the

street. And the location of the lines or routes not specifically located by law, and the position and construction of the tracks, side tracks, turn-outs, stations and other structures which said company is or may be authorized by law to construct, may be such as said company may adopt and the said commissioners approve.

"§ 5. In and through that section of the city of New York, where, by the provisions of section four of the aforesaid act (chapter four hundred and eighty-nine of the laws of eighteen hundred and sixty-seven), the said railroad company is authorized to locate its roadways, tracks, stations, turn-outs and crossings 'along Ninth avenue or streets west thereof,' the particular location, form and structure and number of tracks and grades, elevations and depression thereof, may be such as the commissioners aforesaid, or a majority of them, shall designate and approve.

"§ 6. The said company may demand and receive from each passenger on its railroad, not exceeding ten cents for any distance of five miles or less, and with the assent required by section three of chapter eight hundred and fifty-five of the laws of eighteen hundred and sixty-eight not exceeding two cents for each additional mile or fractional part thereof.

"§ 7. This act shall not be so construed as to authorize the building or extension of their said road through, along or upon any streets or avenues, except along Greenwich street to Ninth avenue, and along Ninth avenue or streets west of Ninth avenue to the Harlem river, as authorized by section four of chapter four hundred and eighty-nine of the laws of eighteen hundred and sixty-seven.

"§ 8. The said company shall construct and complete one track with sidings and turn-outs of its railway along its established route as far north as Central Park, within eighteen months from the passage of this act, necessary and unavoidable delays from the pending of legal proceedings excepted.

"§ 9. All acts and parts of acts inconsistent with this act are hereby repealed.

"§ 10. This act shall take effect immediately."

The other act is chapter 606 of the Laws of 1875, and is what is termed the General Rapid Transit Act. Those provisions which are regarded as material are referred to in the opinion, and it is not necessary to here set them out.

Other facts appear in the opinion.

John F. Dillon and *Julien T. Davies* for appellant. No liability to plaintiff has ever been imposed upon the defendant, because the act of 1867 is, by its terms, inoperative, in the absence of further legislation, and because the act of 1868 is plainly unconstitutional. (*Ode v. M. R. R. Co.*, 56 Hun, 199.) The learned trial judge erred in holding that the act of 1867 imposed an immediate enforceable liability upon the company to pay a percentage to the city. (Endlich on Interp. Stat. §§ 23, 29, 72, 499; *People v. Hills*, 35 N. Y. 449; *Tingue v. Village of Portchester*, 101 id. 294; *People v. Briggs*, 50 id. 553, 561; *Astor v. A. R. Co.*, 113 id. 93; *In re N. Y. E. R. R. Co.*, 70 id. 327; Cooley on Const. Lim. [5th ed.] 178, 212-214; *Warren v. Mayor, etc.*, 2 Gray, 84; *Huber v. People*, 49 N. Y. 132; *Johnston v. Spicer*, 107 id. 185; *People v. Whitlock*, 92 id. 191.) The learned trial judge erred in construing the 9th section of the act of 1867 and the last clause of section 36 of the Rapid Transit Act of 1875 liberally in favor of the city, and with artificial strictness against the defendant. (*S. R. T. Co. v. Mayor, etc.*, 128 N. Y. 510; *C. R. Bridge v. W. Bridge*, 11 Pet. 420; *O., etc., Co. v. Debolt*, 16 How. [U. S.] 416, 435; *D., etc., R. R. Co. v. Litchfield*, 23 id. 66, 88.) If the defendant is liable at all, it is only for five per cent of the net income of those railways which were authorized and built under the act of 1867. The new franchise for the Third Avenue line conferred by the Rapid Transit Act through the action of the mayor's commissioners was a fresh grant by legislative authority and did not subject that line to the liabilities which the act of 1867 imposed upon the Greenwich Street or Ninth Avenue line. (*In re N. Y. E. R. Co.*, 70 N. Y. 337; *S. A. R. Co. v. G. R. Co.*, 3 Abb. [N. C.] 387.) The

last clause of section 36, chapter 606, Laws of 1875, is violative of section 17 of article III of the State Constitution, and is, therefore, wholly invalid. (*People v. Hoyt*, 7 Hun, 69; *People v. Banks*, 67 N. Y. 575.) Any liability upon the New York Company to pay on its Third Avenue line five per cent under the acts of 1867 or 1868, or June 17, 1875, is inconsistent with the terms and conditions under which the board of rapid transit commissioners authorized the construction of the Third Avenue line, and with the consent of the city thereto. (*In re N. Y. E. R. R. Co.*, 70 N. Y. 352.) Even if the defendant's liability covers the Third Avenue line also, there has been full payment, and a judgment for an accounting must be denied. (Cook on Stock & Stockholders [3d ed.], § 546; *Van Dyck v. McQuade*, 86 N. Y. 38, 47; *Williams v. W. U. T. Co.*, 93 id. 162, 191; *Phillips v. E. R. R. Co.*, 138 Mass. 122; 94 U. S. 505; *N. Y., etc., R. R. Co. v. Nickals*, 119 id. 302; *People v. Suprs.*, 4 Hill, 20, 23.) The recently consummated merger of the New York and Manhattan companies has no bearing upon the issues in this case. (*Tomlinson v. Branch*, 15 Wall. 460; *C. R. R. & B. Co. v. State of Georgia*, 92 U. S. 665; *C. & O. R. Co. v. Virginia*, 94 id. 718; *Tennessee v. Whitworth*, 117 id. 139; *Fisher v. N. Y. C. R. R. Co.*, 46 N. Y. 644.) There has been a complete failure of consideration for the contract under which alone defendant could be required to make these payments if the act of 1868 is valid. (*Powers v. M. R. Co.*, 120 N. Y. 178; *Ode v. M. R. Co.*, 56 Hun, 199.) The defendant should have judgment against the plaintiff upon one or more of its counterclaims. (*Taylor v. Mayor, etc.*, 82 N. Y. 10; *Powers v. M. R. Co.*, 120 id. 178; *Kane v. N. Y. E. R. Co.*, 125 id. 164; *Stone v. Frost*, 61 id. 614; 1 Spence Eq. 632, 633; Bisp. Eq. §§ 185-188; *In re S. L. Ass. Co.*, 2 J. & H. 408; L. R. [9 Ch. App.] 609; *Daniel v. Sinclair*, L. R. [6 App. Cas.] 190; Story's Eq. Juris. § 212a; *Cooper v. Phibbs*, L. R. [2 H. L.] 149; 17 Ir. Ch. 79; *Stone v. Godfrey*, 2 DeG., M. & G. 76.) The remedy of the city is at law and not in equity. This point

is supported by the express language of the very section of the act of 1868 which, if constitutional, is the basis of this action. (Laws of 1868, chap. 855, § 3.)

David J. Dean for respondents. The charter obligations and duties of the New York Elevated Railroad Company, which the defendant has assumed, and is in law bound to discharge, included the payment to the plaintiff of five per cent of net income as claimed in the complaint of both the Third and Ninth Avenue lines. This is true as to the Ninth Avenue route of railway by reason of the charter rights and powers and charter obligations and duties relating thereto. (*Taggart v. Murray*, 53 N. Y. 233; *People ex rel. Mason v. McClave*, 99 id. 89; *Bell v. Mayor*, 105 id. 139; *Mayor v. T. A. R. Co.*, 16 N. Y. S. R. 122; *Walter v. Newbach*, 47 Hun, 166; 114 N. Y. 36; *People ex rel. v. Lacombe*, 99 id. 43; *Mayor, etc., v. D. D., etc., R. R. Co.*, 47 Hun, 199; 112 N. Y. 141; *Mayor, etc., v. B., etc., R. R. Co.*, 97 id. 275; *Mayor v. E. A. R. R. Co.*, 43 Hun, 618; *Mayor v. T. T. S. R. R. Co.*, 113 N. Y. 311; *T. Co. v. Illinois*, 96 U. S. 63; *C. M. Co. v. State*, 144 id. 550.) Defendant is estopped from claiming that the act of 1867 never became operative. (*McKeen v. Delancy*, 5 Cranch [U. S.], 22; *Fort v. Burch*, 6 Barb. 60-73; *DuBois v. Brown*, 1 Dem. 317; *Power v. Village of Athens*, 26 Hun, 287; 99 N. Y. 592; *Westbrook v. Miller*, 56 Mich. 148; *Heath v. Wallace*, 138 U. S. 573; *U. S. v. A. R. Co.*, 142 id. 615.) Any uncertainty in the act of 1867 was cured by chapter 595 of the Laws of 1875, which ratified and confirmed chapter 855 of the Laws of 1868. (*Mayor, etc., v. T. T. S. R. R. Co.*, 113 N. Y. 311.) Defendant is liable for five per cent of the net income of the Third Avenue route or railway. (*P. R. T. Co. v. Dash*, 125 N. Y. 104; *In re E. R. R. Co.*, 70 id. 336; *Mayor, etc., B. R. R. Co.*, 97 id. 282; *Mayor, etc., v. D. D., etc., R. R. Co.*, 112 id. 141; *Mayor, etc., v. E. A. R. R. Co.*, 43 Hun, 50; *People v. O'Brien*, 111 N. Y. 1; *Mayor, etc., v. T. T. S. R. R. Co.*, 113 id. 317.) The defendant having received and retained to and for the

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use of the plaintiff five per cent of the net income of both the Ninth and Third Avenue railways, from passenger traffic upon these railways, may be required to account in equity for the moneys so had and received. (*Marvin v. Brooks*, 94 N. Y. 75, 76; *Moxon v. Bright*, L. R. [4 Ch. App. Cas.] 292; *Foley v. Hill*, 2 H. L. Cas. 28; *Marston v. Gould*, 69 N. Y. 225; 1 Story's Eq. Juris. § 463; *Shephard v. Brown*, 4 Gifford, 208; *Hemings v. Pugh*, Id. 456.) Defendant's counter-claims should be disallowed. (*Redmond v. Mayor, etc.*, 125 N. Y. 632; *Brisbane v. Dacre*, 5 Taunt. 53; *Sillman v. Wing*, 7 Hill, 159; *Preston v. Boston*, 12 Peck, 14; *Trippler v. Mayor, etc.*, 125 N. Y. 617; *Dugan v. B. Co.*, 27 Penn. St. 303; *People v. Kerr*, 27 N. Y. 188; *Kellinger v. R. R. Co.*, 50 id. 206; *Kane v. M. E. R. R. Co.*, 125 id. 124; *Mayor v. B. R. R. Co.*, 97 id. 282; *Mayor v. T. T. S. R. R. Co.*, 113 id. 311; *Story v. N. Y. E. R. R. Co.*, 90 id. 122; *Lahr v. M. E. R. Co.*, 104 id. 268; *Mayor, etc.*, v. *E. A. R. R. Co.*, 43 Hun, 50.) Defendant cannot be relieved from its alleged mistake of law. (*Story v. N. Y. E. R. R. Co.*, 90 N. Y. 143.)

PECKHAM, J. The foundation of the plaintiff's claim in this action rests upon section 9 of the act of 1867.

That section provides for the payment of five per cent of the net income of the railroad company into the treasury of the city "in such manner as the legislature may hereafter direct, as a compensation to the corporation thereof, for the use of the streets thereof." The act provided for the construction in the first instance of an experimental elevated railway to be operated exclusively by means of propelling cables attached to stationary engines, for a distance of half a mile along the southern extremity of Greenwich street. The corporation was given, by the tenth section of the act, one year in which to construct the experimental section, and after its completion it was to be inspected by the commissioners provided for in the act, and if they approved it was then to be built within five years of that time along Greenwich street to Ninth avenue, and

along that avenue or streets west of it to the Harlem river. It is plain, therefore, that there was no idea that the railroad would be ready for business or put in operation prior to another annual session of the legislature. Indeed the probabilities for even a later period would seem to have been very strong. It follows that it was not important to state in the statute then passed when or in what manner the five per cent should be paid by the corporation then empowered to go on and construct within the year an experimental section of railroad. That detail might safely be left for future legislation. But as the corporation was given by the act various powers and privileges, it was certainly appropriate, even though not necessary, to state the burdens or conditions which were to be imposed upon the corporation in return. If not stated at that time, there might be given an improper force to the argument against the imposition of any other or greater burdens in the future than were contained in the act of 1867. Hence, the statement of the condition as to the five per cent. The burden was plainly and in terms imposed, but the time and manner of payment were just as plainly stated to be as the legislature should thereafter direct. Why the manner of payment should have been deferred for future direction by the legislature is a question not now easily answered; yet the fact that it is so deferred by the act of 1867 is as definite and clear as language can make it. The language is so plain and peremptory that unless it is wholly rejected as meaningless, the only effect that can be given to it is to put off the immediate obligation to pay until the legislature at some future time gave directions upon the subject.

It is a waste of time to cite the general canons of construction which obtain in the discharge of the judicial duty to construe an act of the legislature. They are familiar to us all and they result in the question, what is the real meaning of the enacting body? That meaning is to be first sought in the language used, and if that be plain, unambiguous and imperative, there is nothing left for the courts other than to obey the directions of the statute as manifested by its language. There-

is nothing necessarily unconstitutional or otherwise illegal even in an absurd statute, although a proper respect for the legislature will prevent any court from lightly imputing absurdity to any legislative enactment. Effect must be given to the whole of the language used, if it be plain and do not lead to anything manifestly so unjust or absurd that it cannot be assumed the legislature really intended such result. This statute, as we construe its plain language, contains nothing that is either absurd or unjust. In this case the counsel for the city claims that the language providing that the five per cent shall be paid in such manner as the legislature may thereafter direct, is unimportant and the corporation may be required to pay without such subsequent direction. It is said that the city has and always has had ample provision by general laws for the payment, receipt and disbursement of all its revenues and under proper safeguards and securities, and that this five per cent could, ever since the amount was imposed by the act of 1867, have been properly collected and disbursed under those laws. I have no doubt of the existence of laws of this nature as claimed by the learned counsel, and if the statute of 1867 had provided that this five per cent should be paid to the city in the same manner, at the same time and be disbursed for the same purposes that its other general revenues were, the railroad corporation would have been liable and obliged so to pay that sum. But these facts must be supposed to have been within the knowledge of the legislature when it passed this act, and it is plain that the facts did not furnish to it reasons appropriate for enacting that the payments should be made in the manner so provided by those laws. On the contrary, the legislature, by enacting another provision in regard to the manner of payment, must be held to have distinctly refused to provide for a payment in accordance with existing provisions. Instead of that, it says the payment shall be made in the manner in which the legislature may thereafter direct. If nothing further were done or directed, and the company should have organized and built and operated its road and refused to pay the five per cent, it is quite clear to me that the company could not be

placed in default because of such refusal, and that no action could be maintained against it to recover such amount until the legislature had given directions upon the subject. When the corporation, in the course of operating its road, should receive a fare, the city would not thereby have a title to five per cent thereof, nor would such five per cent be the property of the city while it remained in the treasury of the railroad company. The five per cent which the railroad must pay is that proportion of the net income of the corporation, and what that sum may be is, of course, the result of an inquiry into expenses, which must result in the further inquiry as to what are expenses or other proper deductions from the main sum before the net income is arrived at. This inquiry is absolutely necessary, and the point is how often and upon what actual basis shall it be made. It is wholly unlike the case of *Mayor, etc., v. Twenty-third Street Railway Company* (113 N. Y. 311), which provided for the payment of a percentage of the gross receipts of the company.

In any view that may be taken, I am unable to construe this act of 1867 other than according to its plain meaning, and then it appears that as to the manner and time of payment of this percentage, the legislature has said that it should be as it should thereafter direct.

In this condition of affairs the legislature, by chapter 855 of the Laws of 1868, passed an act by the second section of which it is conceded that directions were given for the manner (and time) of the payment of this five per cent on the net income of the corporation. This act has been held unconstitutional by the courts below because passed in violation of section 16 of article 3 of the Constitution, which provides that no private or local bill shall be passed which shall embrace more than one subject and that shall be expressed in its title. *In the Matter of New York Elevated Railroad Company* (70 N. Y. 327, 336) EARL, J., referred to this act and, while believing the objection to it to be well founded, assumed without deciding that it was unconstitutional and then quoted the act of 1875 (Chapter 595) as curing any defect

which the company might otherwise have suffered from because of this invalidity of the 1868 statute.

It was not held that the act of 1875 validated the unconstitutional act of 1868, or otherwise infused life into it. It was simply held that the act of 1875 by force of its own provisions supplied any defect which existed by reason of the invalidity of that of 1868.

We think the courts below were right in holding that the act of 1868 was invalid for the reason that it violated the constitutional provision already referred to. The whole act is so inseparable, its different parts are so interwoven and dependent one upon the other that the attempt to uphold any portion after striking out the other would be a hopeless undertaking. It cannot be supposed that one part would have been enacted with the other portion left out, and the invalidity of a portion carries down with it the balance of the act. In truth the first part of the title of the act is insufficient to express any subject whatever, as has been already held. (*People v. Hills*, 35 N. Y. 449; *People ex rel. v. Briggs*, 50 id. 553, 561.) The second portion of the title, that which relates to the application of revenue in the county of New York, is misleading and wholly insufficient as an expression of the subject of the act. It gives a very false idea as to the subject and nature of the legislation actually embodied in the bill. Taking the title in detail and as a whole, it appears to us to be a plain violation of the Constitution.

Standing alone we are compelled to hold that the directions given by the Legislature, in an act which is wholly unconstitutional, cannot be referred to as the directions called for by the act of 1867. There are, however, other facts to be yet alluded to. It would seem that the corporation named in the act of 1868 proceeded to avail itself of the extended time given it thereby, in which to construct the experimental section provided for in the third section of the act of 1867, and after such experimental section had been approved by the commissioners appointed under that act (1867), which approval was in July, 1868, the company further proceeded

towards the construction of the railroad along the route provided for in section 4 of the act of 1867. But the construction of the railroad was not, as to motor power, a compliance with section 2 of the act of 1867, inasmuch as, by the plan adopted and approved by the commissioners above mentioned, the railroad was not to be operated exclusively or at all by means of propelling cables attached to stationary engines, but, on the contrary, the plan actually adopted and carried out was that which was approved by the above commissioners under the provisions of section 1 of the act of 1868. That act permitted the company to adopt any other form of motor which might be approved by the commissioners appointed under the act of 1867, and the form actually adopted was carried out in the construction of the road by the company; and this construction has been permitted by the state and the city authorities, all parties then assuming the validity of the act. The company also availed itself of the permission to change its name, granted by the fifth section of the act of 1868, and in July, 1868, it filed for that purpose supplementary articles of association in the office of the secretary of state. It also, and on or about September 1, 1868, made and executed the bond of \$100,000, provided for in section 3 of the same act, and on or about September 18, 1868, it executed the bond provided for in section 11 of the act of 1867.

Prior to 1871 the corporation, by two several mortgages, mortgaged its property, franchises and rights for the purpose of constructing and equipping the railroad from the Battery along Greenwich street and Ninth avenue to Thirtieth street. These mortgages were duly foreclosed, and by virtue of the sale made under and pursuant to the judgments of foreclosure entered in August and September, 1871, and the conveyances and transfers duly made pursuant thereto, the New York Elevated Railroad Company acquired all the rights, powers, privileges and franchises which had belonged to or were vested in and held and enjoyed by the companies described in those judgments and in the acts of 1867 and 1868. The New York Elevated Railroad Company had been incorporated under the

General Railroad Act of 1850 and the several acts amendatory thereof, for the purpose of operating, etc., a railroad from the Battery through the westerly part of the city to Westchester county and thence to Putnam county, and its articles of association were filed in the office of the secretary of state about October 27, 1871. Subsequent to the conveyances just mentioned the New York Elevated Railroad Company continued the construction of the railroad from the south end of Greenwich street along through the same to Ninth avenue, and along Ninth avenue to Sixty-first street with the acquiescence of the state and city authorities, and such railroad was in operation as an existing elevated railroad prior to the passage of either of the acts of 1875, hereafter mentioned.

Prior to the time when the defendant took possession of the Ninth avenue line (in 1879), and while the road was operated by the other companies, they did not question the obligation to pay this five per cent, but, on the contrary, it was paid quarterly to the city. In 1875 the act (Chap. 595) was passed. The New York Elevated Company was by the first section of the act confirmed in the possession and enjoyment of all the rights, powers, privileges and franchises as fully and at large as they were granted in and by the acts of 1867 and 1868 to the predecessor company. The fourth section gave the company power to adopt certain alterations in the motor power, as the commissioners under the act of 1867 should authorize or approve. By the sixth section of the act of 1875, the company was empowered to demand and receive certain rates of fare from passengers carried on its railroad, and with the assent required by the third section of the act of 1868, a sum not exceeding two cents for each mile or fractional part thereof over five miles. The New York Elevated continued the payment of the five per cent after this act of 1875 was passed and down to the time of the execution, in 1879, of the lease by it to the defendant, and the defendant, during all the time of the existence of such lease, paid to the city treasury what it alleged to be five per cent on the rental of the New York Elevated Company. After the surrender of the old and the execution of a new lease, and up

to the commencement of this action, the defendant has paid what it claimed was five per cent of the amount of the rent secured by the lease.

The question is whether, by virtue of these various actions of defendant and its predecessors, together with the acceptance of subsequent legislation on the subject, based upon the assumed validity of the act of 1868, there has not been a waiver of the defense that the act was unconstitutional. Persons, or corporations even, may waive in some matters, and upon some occasions, a constitutional or statutory provision in their favor. (*Embury v. Conner*, 3 N. Y. 511; *In re Application of Cooper*, 93 id. 507-512; *In re Petition of R. R. Co.*, 98 id. 447-453; *Sentenis v. Ladew*, 140 id. 463-466.) In the last-cited case it is said: "A party may waive a rule of law, or a statute, or even a constitutional provision, enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public morals are involved, and having once done so he cannot subsequently invoke its protection." Although the provision as to a local act containing but one subject, which shall be expressed in its title, is of a public nature and was placed in the Constitution for the purpose of preventing surprises as to the object and purpose of any proposed legislation, yet when an act has been so passed, and its enactments bear upon the private rights of an individual, the constitutional provision then becomes as to him, one which is, within the meaning of the expression, enacted for his benefit, and it is then a matter which such individual may, as to his private rights, waive the benefit of, and consent to perform or submit to the requirements of the act, the same as if the constitutional provision had not been violated. And when once such waiver has been made and such consent been given, the party so waiving and consenting is forever concluded thereby. Especially should this be so where the party takes benefits granted by the act. But for the defect in the title of the act of 1868 it must be conceded that a sufficient direction as to the manner of payment of the five per cent was given by that act. The burden of payment

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had been already placed upon the company by the act of 1867, and it was therein declared that it should pay this per cent of its income to the city as a consideration for the use of the streets. The time and manner of such payment were left for future legislation, and when the act of 1868 gave these directions we see no reason, in the nature of the subject, why the company could not waive the defense that the legislation was void and proceed to recognize and obey it to the same extent as if it were valid. The company availed itself of the extension of time granted it for the construction of its road under the first section of the act and changed its motor power and constructed its road as therein permitted and under the acquiescence of all the public authorities, and it also changed its corporate name by virtue of another section of the act, and it or its successor paid the five per cent of its net income as provided for in the second section of the same act. Is not this a waiver of any defense to the further payment of the percentage founded upon the unconstitutionality of the enactment? What is it other than a recognition by the company of the sufficiency of the directions and a final and full consent to recognize the obligation to pay thereafter and to put aside and waive the defense that the legislature had not yet spoken as provided for in the act of 1867? Under these circumstances it ought to be held estopped from setting up thereafter a defense grounded upon the invalidity of an act by virtue of some provisions of which and by the consent and acquiescence of all the public authorities, state and city, it had proceeded to change its motor power, construct its road and change its name. Further than this, the predecessor of the defendant accepts the act (Chap. 595 of the Laws of 1875) in which the act of 1868 is referred to as if it were a valid enactment, and while availing itself of the provisions of this act of 1875, the defendant's predecessor continues payment of the percentage in the time and manner provided in the act of 1868. All the foregoing conduct must be regarded as a waiver of a constitutional provision which would otherwise operate, if insisted upon, in favor of defendant, and it must be held that the

defendant has duly consented to the binding force of the directions of the act.

It is said that if the defendant be held to the waiver of the defense of invalidity as to the act of 1868, it must be granted the rights as well as be saddled with the burdens of the act. If this be assumed as a correct statement it will be difficult to point out any rights belonging to the railroad company which are not now assured to it outside of that act. The rights or privileges spoken of in the first section of the act of 1868 have been practically covered and provided for by the act of 1875, and if without the benefit of the act of 1868 it might have been urged prior to the passage of the act of 1875 that the company had forfeited its right to build the road because of the time limit in the act of 1867, and was also building it for use by an unauthorized motor, it is clear that the act of 1875 by its provisions recognizes and validates the right to build the road and to use such motor, and it gives further directions in regard to it. It is the second section of the act of 1868 which has been complied with by defendant and which provides for the payment of the percentage. It is true it is also provided in the following section that the rates of fare theretofore or therein legalized are not to be changed without the mutual consent of the parties, and it would appear that the rates never have been changed without such consent. There is nothing else in the act which the defendant or its predecessors would have to depend upon for their rights or privileges. The consideration, as stated in the third section of the act of 1868 for the payment of the five per cent, is the use of the streets by the railroad as provided by law. The ninth section of the act of 1867 stated the same consideration for the exaction. In neither act did it appear that the compensation was to be for the use of the streets as against any one but the city, and the eleventh section of the act of 1867 provided otherwise. If all rights and privileges spoken of in the act of 1868 were necessarily brought into full life and vigor by holding that defendant had waived a defense founded upon the invalidity of that act, there would be no valuable

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franchise thereby renovated and brought into active existence for the benefit of the defendant. It is not necessary, however, to say what the effect of our holding may be upon the rest of the act.

The burden of paying the five per cent was imposed upon the corporation by the act of 1867, and that obligation has been a valid and subsisting one ever since the passage of that act. It was not a creation of the act of 1868, for that act simply gave formal directions in regard to the manner in which a previously existing legal obligation should be discharged. We hold now that the defendant and its predecessors, by reason of their acts of payment and the acceptance of some of the privileges conferred by the act of 1868, and also by reason of its accepting the provisions in its favor already spoken of as given by the act of 1875, and the payments of the moneys up to the time of the commencement of this action, have waived and are estopped from setting up any objection that might otherwise have been offered to the provisions of the second section of the act of 1868, so far as they provide for the manner and the time of the payments of the five per cent imposed upon the defendant's predecessor as a burden by the ninth section of the act of 1867. This waiver having once been made, operates effectually for the future as well as for the past. It is an answer to the alleged illegality of the statute when such illegality is set up as a defense to an action to enforce payment of the percentage in the manner prescribed in such act. It is just as potent in such case as it would be if interposed to a claim to recover back moneys already and actually paid according to the terms of the act.

Nor can it be said that the payments can operate only as a recognition of liability to the extent that they were made. The liability is to pay a sum of five per cent of the net income, and the defendant recognizing its liability has paid a sum which it alleges satisfies that requirement. The plaintiff denies it, and the question whether the payment has or has not equaled in fact what each party assumed was the real legal liability may be hereafter tried out between them.

On this branch of the case our conclusion is that the defendant rests under an obligation to pay into the city treasury a sum of five per cent of the net income of the railway of the defendant on the Ninth Avenue line, from Greenwich street up to Sixty-first street, and from the latter street to Eighty-third street, a sum of one-half of five per cent. The accounting will show how much of this sum has been in fact paid since 1880.

Second. The next inquiry is as to the liability of the defendant to pay the percentage upon the passenger traffic on its so-called Third Avenue line. I shall assume its own liability if it ever existed on the part of its predecessor, for it does not seem to be controverted that the defendant succeeds to such liabilities. The answer to the question depends upon the construction of the latter part of section 36 of the Rapid Transit Act. (Chap. 606 of Laws of 1875.) Prior to entering upon its discussion it will be well to state the rule which should obtain in the consideration of the statute. I do not think it is a case where a construction should be adopted that is most strongly adverse to the company assuming to build and operate its road under the provisions of the act, or any section thereof, nor is the public to be entitled as of course to the benefit of any doubt as to the true construction of the language to be found in the statute. Where privileges are granted or exemptions conferred by the legislature, in the shape of charters or grants to third parties, the grantees are to take only what is clearly granted, and they shall take nothing by implication which is not necessary for the full and fair enjoyment of the thing granted.

The principle is quite well settled, and the only subject of discussion is whether the particular case comes within it. (*Langdon v. Mayor of N. Y.*, 93 N. Y. 129, 144; *Mayor of N. Y. v. Dry Dock, etc., R. Co.*, 47 Hun, 199; *S. C. on appeal*, 112 N. Y. 137.)

When the Rapid Transit Act of 1875 was passed the answer to the question whether the plan therein provided for would prove a success was in great doubt. Certain privileges and

franchises were provided to be given companies organized or operating a road under the act, and in return certain conditions and burdens were exacted from and imposed upon such companies. The persons who might be found willing to invest capital in the project might, in one sense, be termed "adventurers," because they would be investing their money in a scheme the result of which was then most doubtful, and which might leave them with their capital wasted, and with a costly and at the same time worthless structure on their hands. It is safe to say if at that time the interest of abutting owners had been understood to be as it has been since decided, not a railway would have been built under the provisions of this act of 1875. It is matter of public history that at this time capitalists were timid as to venturing their money in what seemed to be a somewhat visionary scheme. Some reasonable prospect of possible future profits to arise from the experiment would necessarily have to be presented before the risk would be taken. The above act was the means of testing by practical experiment the question of the feasibility of elevated railways, and the possibility of their becoming a paying investment while at the same time furnishing a satisfactory solution of the problem of rapid transit through the city.

The roads have been built under the provisions of the act, and subsequent to their building (many think in consequence thereof) the upper part of the city has grown enormously and has, in truth, become transformed from vacant swamps to streets bounded by rows of costly buildings. The roads have certainly shared in this prosperity, but the burden and effect of payment for the interests of abutting owners have been, still are and always must be felt most powerfully. The large amounts of these payments make a very strong drain upon the financial ability of the companies. That they are able to go on under the obligation and yet earn enough to make the property a valuable one is surely not a cause of regret, nor should it furnish a reason for treating the companies other than in a fair spirit. Looking at the facts as they existed in 1875 we think the act should be fairly construed like any other grant

made by the state upon consideration, and the language of the act should not be twisted out of its fair meaning, or any violent and strained construction adopted for the purpose of holding the defendant to the payment of this percentage.

The following is the text of the thirty-sixth section of the Rapid Transit Act, under which mainly the question arises :

"§ 36. Whenever the route or routes determined upon by said commissioners coincide with the route or routes covered by the charter of an existing corporation, formed for the purpose provided for by this act, provided that said corporation has not forfeited its charter or failed to comply with the provisions thereof requiring the construction of a road or roads within the time prescribed by the charter, such corporation shall have the like power to construct and operate such railway or railways upon fulfillment of the requirements and conditions imposed by said commissioners as a corporation specially formed under this act ; and the said commissioners may fix and determine the route or routes by which any elevated steam railway or railways, now in actual operation, may connect with other steam railways or the depots thereof, or with steam ferries, upon fulfillment by such elevated steam railway company, so far as it relates to such connection, of such of the requirements and conditions imposed by said commissioners, under section four of this act, as are necessary to be fulfilled in such cases, under section eighteen of article three of the Constitution of this state, and such connecting elevated railway shall, in such case, possess all the powers conferred by section twenty-six of this act ; and when any connecting route or routes shall be so designated such elevated railway company may construct such connection, with all the rights and with like effect as though the same had been a part of the original route of such railway."

This act contemplates three conditions under which an elevated railroad might be built : (1) A company might be formed pursuant to its provisions, and upon complying therewith it might proceed to build a road. (2) The commissioners provided for in the act might determine upon certain routes, and

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if they coincided with those covered by the charter of an existing corporation, then such existing corporation shall have the power to construct the road over those routes as if it had been specially founded under the act, upon fulfilling the requirements and conditions of the commissioners. (3) The commissioners might fix upon and determine the route by which any existing elevated railway then in actual operation might connect with other steam railways, etc. The provision for building under the second above-named condition in fact only applied to the Metropolitan, formerly the Gilbert Elevated railroad. That company had its charter, and instead of forming a new company under the general provisions of the act, the Metropolitan came in under the thirty-sixth section as a company having a coincident route. It is conceded that this company thus coming in under that section to operate a substantially rival road on the east portion of the city, was not, by this statute, bound to pay any percentage of its income to the city. It was to be subject to the requirements and conditions of the commissioners, but the statute provided for no direct burden of this kind, and none such has ever been imposed upon any other elevated railroad in New York.

The New York Elevated Company applied to the commissioners pursuant to the provisions of this same thirty-sixth section, and those commissioners exacted from the company as a condition precedent to their laying out any connecting routes for that company under this section, an agreement and consent which is fully set forth in the record. Among the conditions therein imposed was the time within which the construction should be commenced and completed, and there was also one relating to the rates of fare which it should charge and in regard to the running of so-called commission trains during certain hours. These rates of fare were, in many respects, lower than those which the West Side and Yonkers road was authorized to charge and receive for the same service. Another condition imposed was that the company should pay such proportion of the expenses of the board of commissioners as the board might designate. The conditions having been

assented to and an agreement signed by the company, the commissioners laid out the routes and transmitted to the common council their report of the conditions obtained from the company, and the common council, on September 7, 1875, duly ratified the report and gave its consent to the building of the road upon the conditions named in the agreement. Since the time when the legislature had granted for a consideration expressed in the statute of 1867 the use of the streets of the city for railroad purposes, an amendment to the Constitution had been adopted which rendered the consent of the local authorities and also that of the owners of one-half in value of the property abutting on the streets, necessary before railroad tracks could be laid down in the streets of a city, or in lieu of the consent of the property owners, the favorable report of a commission to be appointed by the General Term of the Supreme Court and a confirmation of such report by the court. The abutting owners in this case did not consent, and a commission was appointed as above provided for, and its report was duly confirmed and the road was built.

The claim of the plaintiff rests upon the last few words of the thirty-sixth section, viz.: "And when any connecting route or routes shall be so designated, such elevated railway company may construct such connection with all the rights and with like effect as though the same had been a part of the original route of such railway."

The argument is that the language bestows the right to build just the same as if it were a part of the original route, and if the connecting routes had in fact been part of the original route of the railroad company and built under the power granted by its charter or special laws, the road would have been also built subject to all the burdens imposed under the same authority, and among them the obligation to pay the percentage.

I do not think the plaintiff's claim is well founded. In the first place it seems to me to be a most forced and unnatural meaning to give these words, something not called for, but, on the contrary, plainly at war with the immediate context. The

right to build the connecting routes is plainly derived solely from this thirty-sixth section. The language there used is a clear grant of power thus to build upon fulfilling the conditions mentioned. The section gives to the existing company, after fulfilling the stated requirements, all the powers conferred by section 26 of the same act, and then grants in particular language the power to construct such connecting road with all the rights and with like effect as though the same had been a part of the original route of such railway. It is the power, not the burdens, with which this portion of the statute is dealing. This is the language of an affirmative grant of power, and is not such fit and appropriate language as would ordinarily be used to express the idea that burdens and conditions were to be thereby imposed not at all connected with the power to construct. It was in terms authorizing the construction on the routes fixed. The language did not mean that the routes were to be constructed under the powers given by the old acts relating to the West Side and subject to the conditions therein imposed. It meant that the company should have the same power to build the connecting routes that it had had to build its old ones. It is said the words have no useful office to perform if the plaintiff's construction be not given them, because by force of the language of the section granting to the company, upon complying with the conditions, all the powers conferred in section 26 of the act, the company would have, under that grant, full power to construct its road. I think the power to build is to be found in that section, but the draughtsman, by simply referring to the twenty-sixth section for the powers to be possessed by the company, did not state in terms in the thirty-sixth section what those powers were, and it would be quite natural, under such circumstances, to state explicitly and in so many words that the company should specially have power to build the road with all the rights, etc., as therein mentioned. It was further assurance, though clothed in different language, that in so building the connecting road the company would be regarded as building it the same as if it had had direct author-

ity to build under its original route. The language does not mean that the company was to build upon the connecting routes under the same obligations and subject to the same burdens as if its road were built under the old statutes, because the act, while granting the right to construct the road over these connecting routes, contained within itself provisions for the imposition of conditions and burdens. The power to impose them lay with the commissioners under sections 36 and 26, already referred to, and with the city authorities. The commissioners could exact them before laying out the connecting routes, and the city authorities could do so before consenting to the construction of the road. The language used, when fairly construed, means that in building the road over these connecting routes the company should be regarded as having the same right to build them as if that right had been granted by the old statutes. This is very different from the case of *The Mayor, etc., v. Twenty-third Street Railway Company* (113 N. Y. 311, 319). In that case it was held that where the defendant had succeeded to and taken all the property rights, privileges and franchises of the Bleecker Street road it took them burdened with its charter obligations. We re-affirm such doctrine here when we hold defendant liable to the burdens imposed upon the corporations of which it is the successor.

There is, however, nothing in that or any other case cited by counsel which holds that, by language such as is used in the section under consideration, the legislature while granting the power intended to burden the grant with a condition not necessarily connected with or affecting the exercise of the power granted.

We know that language is frequently used in a statute which is not really necessary and which, perhaps, is to some extent superfluous. The same idea is frequently repeated in different words. Because different language may be used it is not at all necessary to attribute a different meaning to it each time. The question is on looking over the whole context what is the true meaning of the legislature, and if it be quite

plain that the same power has in truth been given in different portions of the statute, although by the use of different language, it should be so held, instead of making an effort to give different meanings to the language, one of which it does not aptly and appropriately express. This holds good, even though the effort is made for the purpose of imposing a burden upon a railroad corporation which it is plain was not in the contemplation of the legislature. That it was not in the contemplation of the legislature appears to me to be true also for other reasons. The first reason and one already given is that the language is not appropriate to impose this burden. Looking at the surrounding facts, I think the same conclusion must be arrived at. A perusal of the whole act must, I think, convince any one that it was passed, having the three possible kinds of companies above described in view. All of the provisions up to the thirty-sixth section are with reference to the companies to be formed under it. The thirty-sixth provides for the building of the coincident routes by an existing company, while connecting routes were to be built by an elevated railroad company then existing and actually operating a road. Such companies were to go on and construct their respective roads along the routes and operate them under the same act, and in the language of Judge EARL in the *Elevated Railroad Case* (70 N. Y. 327, 353), these various corporations were "simply placed on a footing of equality with new companies which may be formed under the act." As to the new roads which were to be built under the special grant of power coming from the Rapid Transit Act, it is impossible to think that the legislature meant to discriminate in favor of or against any road coming under the act. The whole spirit of the act is to treat all alike and not to impose conditions or limitations upon one which would operate unfairly and as a special burden upon it when compared with the other company which was very likely to be a rival looking to substantially the same population for support. This would be manifestly unfair.

It is conceded that no obligation of payment on income has

ever been imposed upon any other road under the Rapid Transit Act of 1875, and the claim here is worked out at the expense of the fair meaning of the language used.

Other considerations are not wanting. The burden of the payment of the percentage was originally imposed upon the Yonkers Company as a consideration for the use of the streets which the legislature granted. It is unnecessary to hold that this meant the use of the streets as against any rights of abutting owners as well as the city. For this purpose it can be confined to the use of the streets as against the city only. This at least was in terms granted. Since the passage of that act the amendment of the Constitution has been adopted prohibiting such use without the consent of the city authorities. If this language of the thirty-sixth section operates to impose this percentage burden upon defendant, it rests upon it without the grant of the use of the streets for which use the payment formed the consideration in the former case. The burden is the same but nothing is secured to the defendant on account of its being thus imposed. Could this have been intended? And if so, then we find the company under the necessity of making this payment in any event and also bound to submit to such other and further conditions as the commissioners or city authorities should see fit to impose before they would lay out and determine the connecting routes contemplated by the act or consent to the laying of the tracks thereon. These conditions could be made as to the payment of a percentage and as to rates of fare as well as in regard to other matters. Such a company would be at the greatest disadvantage, for by reason of the percentage burden it might be unable to compete upon the same terms which might be imposed upon the coincident routes company and thus it would be treated unjustly. We do not think that a construction which would permit such injustice would be the correct one. The commissioners or the city authorities or both would have the subject entirely under control, and they could impose such conditions as they thought appropriate before laying out the routes or before granting consent to construct

the road. In this way provision would be made for all interests and all would probably be treated alike.

Again, the rate of fare allowed by the old statute for the Ninth Avenue route could be materially reduced with regard to the road to be built by the exercise of this power to consent upon condition as already stated. The power was, in truth, used by the commissioners and the city authorities, and so the defendant had to consent to the reduction before it could obtain the authority to build. Thus, the section of the statute in granting the right to build upon the connecting routes, with all the rights and with like effect as if part of the original route, must be held not to mean what it is contended to mean, at least to the extent claimed. If it is meant to give all the rights literally then the company would have the power to charge the rates of fare provided for in the statute of 1867 or 1875, and the plaintiff so assumes and argues that in consenting to take less the company consented to a condition which the commissioners had no right to impose.

We think the commissioners or the city authorities had the right to impose conditions upon that as well as other subjects concerning the building of the road, hence "all the rights" were subject to modification by the action of those bodies. Not having "all the rights" certainly the special burdens should not be imposed by a mere implication. The commissioners having full power in the case of the defendant's predecessor to consent to lay out the routes upon such conditions as they might think appropriate and such as they could impose in the case of companies who were to build coincident lines, why should an unnatural construction of the last two or three lines of the section (36) be resorted to for the purpose of holding defendant to this five per cent obligation on the Third Avenue route when none such was or ever has been imposed in the case of the other railroads which have been erected and operated under and by virtue of the provisions of the Rapid Transit Act?

There is another reason why the language used cannot be given the literal meaning claimed for it.

The provision assumes to give all the rights, and with like effect, as if the route had been a part of the original route. All the rights would include the free and unconditional use of the streets of the city, as given by the former statutes, and without the consent of the city authorities, and for no other compensation than the five per cent payment. Yet this, it is conceded, cannot be done, because of the constitutional amendment, and, therefore, this clause in the statute must be so read as to mean that the company is to have all the rights which may remain after the commissioners shall have announced the conditions upon which they will fix and determine the routes, and the city authorities shall have given their consent upon their own conditions and the consents of the proper number of property owners shall have also been given. In granting rights which are thus made wholly uncertain as to their nature and extent, and which are incapable of enumeration until after the above-mentioned determination and consents have been made and given, can it be possible to plausibly contend that the legislature, while affirmatively granting a power, yet by the use of these words, "with the same rights and with like effect," nevertheless meant to impose a burden to which no other company taking rights under the act was subjected? It is seen that "the same rights" were, in truth, not given. Why should burdens be imposed when rights were lessened? We think our construction of the words is much more plausible and much nearer the real intention of the legislature itself.

Conditions might be imposed before fixing these routes, and, indeed, in this very case they were imposed, which are inconsistent with the exercise of "all the rights" under the other statutes, the rates of fare being a very forcible example.

It is said the commissioners had no right to impose any condition as to rates of fare, and that they knew it, and, therefore, obtained an agreement as to the fare from the company. I deem the manner in which the rate of fare is established to be of small importance, whether by imposing such rates in the first instance, and as a condition upon which the route is fixed and determined, or by saying to the company: If you do not

agree we will not fix the routes. It is found here that these conditions were imposed upon the company in the way of an agreement by it, but it was made a condition precedent to marking out the routes. And we think the commissioners had the right to demand such an agreement as a precedent condition. It is also worthy of remark that the commissioners, while evidently assuming jurisdiction over the whole subject of the conditions and exactions upon compliance with which they would proceed to fix and determine these routes for defendant's predecessor, and while exacting from it an agreement which it is seen covers the whole general subject, never placed this burden upon the company, nor can it be seen by any writing or evidence upon the subject that such burden was supposed to exist.

Upon the whole statute and in light of the surrounding facts known to the legislature at the time, we cannot but think that the construction of this section, as contended for by the plaintiff, is strained, unnatural and incorrect. There can be no fair reason assigned for any distinction between the rights of these various companies granted under this act to the disadvantage of the defendant's predecessors.

Finally, it is said that the defendant ever since 1879 has recognized its liability to pay this amount, and in fact has paid what it claims is a sum equal to the five per cent up to the time of the commencement of this action. Practical construction of the parties, it is claimed, makes the claim of plaintiff valid. I do not attach the same importance to the fact of payment that the plaintiff does. There must be at the bottom some statutory liability of defendant, or else it is not obliged to pay the amount in the future.

In relation to the obligation to pay on the Ninth Avenue route, it was placed in the act of 1867, which was concededly valid. The method and time of payment were thereafter prescribed by the act of 1868, which defendant consented to obey and waived the right to defend on the ground of its invalidity. But here there is no statute which authorizes the exaction, however mistaken the parties may have been in

regard to its construction. There has never been any statutory authority for its payment, and there has been nothing for the defendant to waive. The payment has been purely gratuitous. If the statute were ambiguous enough to allow a fair and rational doubt as to how it ought to be construed, and the construction actually given it by the parties were as near the true one as any could be said to be, in such case it might be the inclination of courts to construe it in accordance with such practice of the parties. In this case, however, we do not feel that the act can be fairly or naturally construed in the way plaintiff claims.

This leads to a reversal of the judgment as to the Third Avenue route.

Third. The counterclaims of the defendant we do not think can be allowed. There was never any warranty in regard to the free use of the streets by defendant as against abutting owners. On the contrary, the very act under which defendant claims the right to recover the sums paid to abutting owners, provides for the payment thereof by the company. (Sec. 11, act of 1867.) The amounts heretofore paid by defendant cannot be recovered back as involuntary payments within any principle, and the plaintiff is entitled to retain the same. There has been no mistake of fact under which payments have been made, and the defendant must remain where it is in relation to moneys paid heretofore.

We express no opinion upon the proper construction of the expression "net income," but leave that for decision when it necessarily arises. The accounting can go on if necessary, and upon it full evidence may be given so that a decision as to the true meaning of the expression may be arrived at in the light of all the facts surrounding the discussion which it may be material to know.

For the reasons above given the judgment should be reversed and a new trial granted, with costs to abide the event.

GRAY, J., (dissenting). I agree with Judge PECKHAM that the defendant should be held to the obligation of paying into the

city treasury five per cent of the net income from the operation of that portion of its railroad, which is commonly called the Ninth Avenue line. That obligation is certainly enforceable upon the theory expressed in his opinion. I think it perfectly clear that the subsequent acquiescence by the West Side, etc., Railroad Company and of its successor, the New York Elevated Railroad Company, in the directions for payment, contained in the act of 1868, was equivalent to a consent that they should become part of the compact with the state, which regulated its corporate life, and that they should constitute the rule in making the statutory payments. However grave the objections to the act of 1868, upon constitutional grounds, the provisions of its second section related merely to the manner of paying the fixed percentage. The burden of payment was already imposed by the act of 1867, which left for future legislation a matter of detail, as to the manner and times of making the payments. When, subsequently to the passage of the act of 1868, the predecessors of the Manhattan Railway Company made payments of percentages, at stated times, into the city treasury; in legal effect, there was an adoption of the directions of that act, as a regulation of the discharge of the corporate obligation; and the charter then stood as containing as complete an obligation, with respect to such payments, as though the act of 1867 had, in terms, fixed their manner and times.

But I cannot agree with the conclusion that, as to its so-called Third Avenue line, the defendant and its predecessor, the New York Elevated Railroad Company, were exempted from this general charter obligation. I consider that the condition of liability being once established, with respect to the original route, it inevitably and logically follows that that condition continued with respect to all extensions, or connecting routes built by the New York Company, unless and until relieved by competent and certain legislative action. Any other view of the question seems without any justification upon legal grounds, and must be influenced by some quite unwarrantable notion, or sentiment, of injustice to the defend-

ant. After the many years of acquiescence by the defendant and its predecessor in the understanding that the obligation to pay the percentage, imposed by the original act of incorporation, continued with equal force as to new routes, extending their railway, built through the permission given by the Rapid Transit Act of 1875, I think it is altogether too late to indulge in sympathy, or to rest the discussion of the case upon any notion of injustice. It never occurred to the defendant that it was suffering from any unjust and illegal burden, until after the lapse of some twelve years from the construction of the Third Avenue line; and, in fact, a careful and candid consideration of the statutes and of the facts should dispel any doubt as to the justice of holding it to an obligation imposed by law and most willingly assumed. It will conduce to a clearer understanding of a question, which is of very great importance to the city of New York, if we consider what was the general situation at the time of the passage of chapter 606 of the Laws of 1875, or, as it is usually referred to, the "Rapid Transit Act." When that act was passed, the New York Elevated Railroad Company had acquired by purchase, upon foreclosure and upon sales, the property and franchises of the West Side and Yonkers Patent Railroad Company, and was operating its elevated railroad from the Battery, through Greenwich street, to and through Ninth avenue to Thirtieth street, and solely by virtue of the franchises so acquired. It was the only elevated steam railway in actual operation in the city, and, but a day before the passage of the Rapid Transit Act, the legislature had passed chapter 595 of the Session Laws, which confirmed it in its possession of the rights and franchises acquired; authorized and required it to continue and complete elevated railroads, and regulated the construction, operation and management thereof. There was one other corporation in existence at that time, formed under an act passed in 1872, for the purpose of operating an elevated railway, and that was the Gilbert Elevated Railroad Company. Its charter gave it the right to build a tubular elevated railway upon and southerly from Sixth avenue; but it had done

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Dissenting opinion, per GRAY, J.

little, if anything, in the direction of carrying out the chartered project. Amendments to the Constitution of the state, which went into force on January 1, 1875, stood in the way of any legislative action, looking to the extension of the New York Elevated Company's Ninth Avenue line beyond the routes fixed for it on the west side of the city. In that condition of affairs the Rapid Transit Act was passed—in form a general law, or scheme, authorizing elevated steam railways in the city, upon routes and under articles for the incorporation of companies, to be determined and framed by commissioners appointed by the mayor. Being, for the generality of its application, saved from the constitutional inhibition, the act, nevertheless, was, plainly enough, in the interest of the existing New York and Gilbert Elevated Companies, and its thirty-sixth section was inserted to cover the case of each. That section provided, in the first place, for any existing corporation, the routes of which coincided with the routes laid out by the mayor's commissioners, and empowered it to construct and operate its railway as a corporation specially formed under the act. That met the case of the Gilbert Company, and it availed itself of the privileges granted, and changed into an open steam railway, upon the routes determined by the mayor's commissioners coincident with its routes. It subsequently became the Metropolitan Elevated Railroad Company. The intended application of the first part of this thirty-sixth section to the Gilbert Company, as the only one having coincident routes, is not disputed by Judge PECKHAM, and was so assumed by CHURCH, Ch. J., in his opinion in the matter of that company. (70 N. Y. at page 368.)

In the second place, that section provided that the mayor's commissioners might fix the routes by which any elevated steam railway, then in actual operation, might connect with other steam railways, or their depots, or with steam ferries, and concluded in this language: "And when any connecting route or routes shall be so designated, such elevated railway company may construct such connection, with all the rights and with like effect as though the same had

been a part of the original route of such railway." This second provision of the section, as plainly, applied to the case of the New York Elevated Railroad Company; for that was the only "elevated steam railway in actual operation." That company made immediate application and, within two years, received final authority, through an order of the court, to proceed and construct the extension of its route from the Battery, by the south end of the city, through various streets to and through the populous thoroughfare of the Third avenue; all which rights it obtained upon the pretext and theory that, by such an extension of its route, it was enabled to connect with the various ferries and railway depots on the east side of the city. It cannot very reasonably be doubted but that the Rapid Transit Act was promoted by these two companies; which, under cover of an apparently general act, through this brief thirty-sixth section, were enabled to do that which they could not have gained authority to do through a special legislative enactment. The question, then, is whether, having gained this valuable and practically exclusive privilege, there was also secured the additional grant to the New York Elevated Company of an exemption from the obligation, imposed by previous legislation, of paying a percentage to the city as a consideration for the use of the streets. If it did, where is the language of exemption, and what shall we do with the apparently stringent language with which section 36 concludes? An argument is sought to be founded upon supposed effects upon the corporation, coming in under the provision of the section, of conditions, requirements and processes mentioned in the act—effects which are dwelt upon in Judge PECKHAM's opinion. It is suggested that the effect upon the New York Elevated Company, of having passed through the machinery of the Rapid Transit Act, was to make it, as to its new powers, and their exercise in the construction and operation of the new routes, independent and to relieve it from the legal obligation attaching to the operation of its original route. But any such proposition spends its force against the stubborn resistance of the facts and of the language, with which the legislature

concludes its grant of power to the applicant, under the section; which is couched in the form of a limitation and which differentiates it from a corporation formed under the act itself. That the legislature meant something when providing that it "may construct * * * with like effect as though the same had been a part of the original route of such railway," we may not deny. What was the "original route" of the New York Elevated Company, and what were its duties and obligations, the legislature well knew; for the previous day had witnessed the passage of chapter 595 of the Laws of 1875, which had confirmed the company in the possession of the properties, franchises and rights acquired from the West Side Company, "as they were granted" to that company. If we hold that the New York Company and its successor, the Manhattan Company, came under the obligation imposed by the act of 1867 upon the West Side Company, and, if, under section 36 of the Rapid Transit Act, the new connecting routes were to be constructed "with like effect," as though "a part of the original route," how can we escape, by sensible processes of reasoning, the conclusion that the legislature meant to provide that whatever, by the law regulating its existence, was imposed upon and required of the company, with respect to the city, whose streets were to be used, in the operation of its original route, should still be a condition of its right to exercise its new power to construct the connections or extensions of that route? The New York Company so understood the matter; as we see evidenced by its continuing to pay the five per cent for the many years after it had constructed the new, or Third Avenue route.

The Rapid Transit Act, in its bearing upon the New York Company, was but an enabling act. These connections of the New York Company, under which description it was enabled to build its present Third Avenue line, are in fact parts of its original route. Had the legislature, by mere amendment of the acts, under which the New York Company became authorized to operate its Ninth Avenue line, further empowered it to build and operate these connections, would any doubt

have existed as to the continuance of the obligation to pay the percentage to the city? Certainly not. Then how has the section of the Rapid Transit Act in question created any such doubt? It is very evident that Judge PECKHAM's consideration of the question was influenced by the belief that, though the right to build connecting routes is derived solely from the thirty-sixth section, its language could not mean that the burden imposed under the old statutes continued, "because," he says, "the act * * * contained within itself provisions for the imposition of conditions and burdens. The power to impose them lay with the commissioners," etc. But that is altogether a mistaken reading of the act. The New York Company was not compelled to forego, or to change, any of its corporate environments of powers and privileges, in order to come in under the act and to avail itself of the further privilege extended to it. Though the power to construct these connections with the original route flowed from the provisions of the Rapid Transit Act, the right to avail itself of the privilege resided in an existing corporation, whose powers and obligations were already defined and regulated. The act conferred no power upon the mayor's commissioners to impose any conditions upon it whatever. That power they did have with respect to the other class of companies, referred to in the section; such as the Gilbert Company. With respect to them, their power to construct and operate an elevated railway was made to depend "upon fulfillment of the requirements and conditions imposed by said commissioners;" but, with respect to the class of elevated roads in actual operation, of which the New York Company was the sole representative, the only power conferred upon the commissioners to impose requirements or conditions was "under section 4 of the act;" and they were such "as are necessary to be fulfilled in such cases under section 18 of article 3 of the Constitution of the state." Reference to section 4 of the Rapid Transit Act shows that no power is there conferred upon the commissioners to impose any conditions, which were not already imposed by the Constitution.

That section (4) simply provides that the mayor's commissioners shall, if they find such railways necessary, within a certain time after organization, determine upon and locate routes for the railways through the streets, etc.; except Broadway and Fifth avenue below Fifty-ninth street, and Fourth avenue above Forty-second street, and except such portions of streets, etc., as are legally occupied by any elevated or underground railroad in actual operation; provided the consents of property owners and of the local authorities be first obtained, or, in lieu thereof, the determination of commissioners appointed by the Supreme Court, etc.

Section 18 of article 3 of the Constitution, referred to in the thirty-sixth section, simply inhibits the legislature from authorizing the construction of street railroads, without the consents or determination of commissioners described in section 4; which has simply embodied the constitutional language. This is all the force of the reference in the language of that section of the act, which permitted connections to be constructed by elevated steam railways in actual operation "upon fulfillment * * * of such of the requirements and conditions, imposed by said commissioners under section 4 of this act as are necessary in such cases, under section 18 of article 3 of the Constitution of this state." Can it, with any semblance of reason, be asserted that, by force of that reference in section 36, the commissioners were given any power to impose requirements or conditions upon the New York Elevated Company, except as to matters already provided for in the Constitution? And, yet, that is the only language in the act, applicable to the case of the New York Company, which refers to the existence of a power in the commissioners to impose conditions. Compare the provisions as to the class of elevated railways in actual operation, desiring to make connections, with the previously described class, of which the Gilbert elevated was the representative, and a discrimination is evident; for in its case the commissioners were empowered to impose such conditions and requirements as

they could in the case of a corporation specially formed under the act.

The Rapid Transit board of commissioners were distinctly advised by their counsel, in an opinion which is printed in this record, that they could only deal with the existing corporation in actual operation, by fixing connecting routes, and that section 36 made a sharply drawn distinction between the case of the special companies by that section contemplated and the new companies in terms provided for. The commissioners, however, were in a position where they might refuse to act harmoniously in fixing connecting routes, and they could request, as a condition of their acting upon the application of the company, that it should agree to some things. The company was, however, under no obligation to submit to any conditions the commissioners might dictate. Though the act, as we readily appreciate, was passed for its benefit, it was free to decline taking any action under it to make connections, if too exacting demands were made by the commissioners or by the city officers. But the company had a clear conception of the situation and was perfectly willing, if not anxious, in order to obtain the necessary official action of the commissioners, to make concessions.

The Rapid Transit Act was passed June 18, 1875. At a meeting of the board of directors of the New York Company, which must have been held very soon afterwards (before September), resolutions were passed to the effect that, in consideration of the fixing by the Rapid Transit commissioners of routes for connections with depots, etc., as heretofore applied for and designated by the company, or such as the company would accept in lieu thereof, the company would agree to construct certain specified portions of these routes, before or by specified dates; to charge fares at specified rates upon such connections; to run "commission" trains; to construct a single, double or treble track road, according to certain localities, and to pay a reasonable proportion of the expenses of the commissioners. This was its voluntary agreement, conditioned upon an acceptance of its previous designation

of the routes it wished to construct upon At a meeting of the commissioners, on September 2, 1875, these resolutions were offered, and the board, thereupon, "in consideration of the stipulations, agreements, etc., of the New York Elevated Company," proceeded to fix and determine the routes for that company, as applied for. On September 7, 1875, the common council of the city, acting upon the full report of the above proceedings, passed a resolution consenting to the routes reported upon by the rapid transit board. It is very remarkable that, with all the particularity with which the company framed its resolutions and with which they were acted upon, there should be nothing said upon the subject of its release from the payment of this percentage.

But if the commissioners were without power to impose any conditions, other than such as the Constitution contained; or to require anything, other than the company might by voluntary agreement assent to, and if the language of the section (36), under which the privilege was extended to the New York Company to extend its original route by connections, etc., is to be construed as without direction upon the subject of the liability to pay percentage, the question again presents itself; how did the company gain an exemption from that burden? Its independence was not affected by the act and what it received under its provisions was a mere enlargement of the right to construct railways in the streets of the city. The commissioners stood there, not with any power to impose conditions, but simply with power to determine upon connecting routes and to require from the company the formal expression of its assent to the constitutional requirements, referred to in section 4. That was the extent of their power over the applicant; though, of course, they could negotiate any agreement between the city authorities and the company, as a condition of an exercise of their limited powers. It is sought to explain away the force of the words, with which the grant of power to construct connecting routes concludes, by treating them as words of further assurance as to the authority to build, and by regarding them as, in reality, unnecessary and superfluous. But the objections to these views are too grave.

The grant to the corporation of the powers conferred by section 26 of the act was not necessary, simply to enable it to construct and operate an elevated railway; but it was deemed necessary, or wise, that every doubt should be removed as to its right to operate an elevated steam railway. In the original act the motor power was to be by a propelling cable, and the change in the motor power, authorized by the subsequent act, was made dependent upon the approval of the commissioners; who, under those acts, were appointees of the governor. By force of the grant in the thirty-sixth section of the powers conferred by section 26, the New York Company was relieved of any question upon the subject of its right to operate an elevated steam railway. It needed no reference to the powers in section 26 to enable it to construct and operate the proposed connecting routes. That right was expressly granted in section 36 and all other requisite corporate powers were already possessed under the General Railroad Act of 1850, or by virtue of its purchase, etc.; with the possible exception, or doubt, as to the power to use steam as a motor, without having first obtained the consent of the governor's commissioners. I think, unless we construe the language, in which this grant of power to construct connections is couched, as working a discrimination against the company, that its existence in the section is reduced to an absurdity. If it is read as continuing the existing legal obligation and as making it co-extensive with the corporate rights of the company in its added field of operation, it receives a sensible and forceful meaning. In empowering the company to construct a connection "with all the rights and with like effect as though the same had been a part of the original route," the language is confirmatory of the existing obligation of the company, and of those corporate rights which were necessary to be possessed for the construction and operation of an elevated railway.

If we regard the exact situation, we cannot fail to see the fallaciousness of the idea that any transformation was occasioned, or that any change in the corporate obligation of the New York Company resulted, when, in consequence of its

application, certain connecting routes were fixed by the commissioners. Any confusion of ideas on that head must be occasioned by the supposition that, through the proceedings, which resulted in the connecting routes being accorded and fixed, the New York Company was so affected, through the imposition of conditions and of requirements under the act, as to give to it a separate set of rights, and that it must have been the intention of the legislature, because thereof, to sever the obligation affixed to the operation of the original route. But, as it has been shown, the permission to build connecting routes came from the legislature, unaccompanied by the imposition of a single condition not already in the fundamental or general law. The whole right to build further was conferred solely by section 36 and that section neither affixed, nor authorized the affixing of, one requirement beyond the necessity of obtaining the consents mentioned in the Constitution, and did not subtract any burden imposed by the charter of the existing corporation. In a court of law we are bound to give effect to the words of the statute, and, if they are susceptible of a reasonable application, we cannot say that they are meaningless, nor dismiss them as superfluous. These words had a place and they had a mission to perform. If we say they do not subject the corporation, in this material respect, as it was subject before, then I think we utterly disregard the evident purpose of their insertion. What other reasonable construction can we give to this legislative enactment, than as a provision authorizing the company to build the connecting routes, when and as fixed by the mayor's commissioners, as though they had been named as a part of its route in the previous legislation? It did not come in under the act as one of the companies it was designed for creating and it was not subjected to the imposition of any of those requirements or conditions at the hands of the commissioners, to which the other mentioned companies were. It simply availed itself of the permission extended by a provision of the act to extend its original route and whatever requirements, whether by the commissioners or by the city authorities, it came under, was

the result of its express consent thereto, and, in no conceivable sense, the result of any condition in the provision of the act.

The constitutional amendments then in force prevented such a grant of power by way of an amendment to the charter and the difficulty was overcome in the legislature by adding section 36 to the Rapid Transit Act; which, being considered as a law general in its application to existing companies, was held not to be in conflict with the Constitution. (*Matter of N. Y. Elevated R. R. Co.*, 70 N. Y. 327.) In the case cited, it was suggested of section 36 that its purpose and effect were to bring existing railroad corporations within the general scheme devised by a general law, and it was very forcibly intimated that the enactment of the section was a way adopted by the legislature "to circumvent the constitutional provision without violating it." (P. 353.) In that and the succeeding case of *The Gilbert Elevated R. R. Co.* (70 N. Y. 367), it was, evidently, considered as to the two existing companies, which availed themselves of the provisions of the Rapid Transit Act, that that act simply recognized and regulated the right already possessed to build and to operate an elevated railway.

It is said that the act placed existing companies on a footing of equality with new companies, to be formed under its provisions, and the *Matter of N. Y. El. R. R. Co.* (*supra*), is cited as authority for this view. But the remark was made, in that case, with respect to the equal right of the New York Company, with the companies to be formed under the act, to apply for connecting routes and to meet the argument that section 36 was violative of the Constitution, as being, with respect to that company, a grant of an exclusive privilege, etc. (See pp. 347, 348, 351-353.) No other inference from the remark is fair or warrantable. That the existing company, availing itself of its provisions to make extensions of its route to connect with other railways, or with ferries, was intended to be relieved of any legal obligation connected with the franchise, of the nature of the one in question, is distinctly negatived, in my judgment, by the absence of appropriate

language to accomplish that result. Any possible inferences that equality of burdens was intended to be conferred become impossible in the presence of the last clause of the thirty-sixth section.

But, it is argued, if the thirty-sixth section operates to impose this percentage burden upon the defendant, it rests upon it without the grant of the use of the streets; for which use the payment formed the consideration under the original act. The argument refers to the change of conditions worked by the amendment to the Constitution, which prohibited the use of the streets without the consent of the city authorities. I cannot see much point in that argument. While, previously, the consent of the legislature was necessary to be obtained to use the streets; by the adoption of the constitutional amendment, it became necessary to obtain the consent of the city authorities. But, in either case, the reason for the payment of a percentage was the same. It was the consideration for the proposed use of the streets, as determined upon by the legislature, and was obligatory at all times. There is no injustice, (and none such was ever imagined by the company), in construing section 36 as continuing the burden of the percentage, although the legislature could not grant the use of the streets. The right to consent to the use of its streets was in the city; but the consideration for that use remained, as to the New York Company, as it had been imposed by the legislature, for all time, or until competently exempted. I fail to perceive any force in the argument based upon the injustice of implying a continuation of the obligation. It is not necessary for us to imply. The obligation was removed, or it continued, and the language is plain enough to read in it the continuation of the obligation. Ample reasons existed for it. It was the only elevated steam railway in actual operation in the city, and, through the provision of the section, the company became enabled to extend the operation of its railways through the more populous and busy portions of the south and east sides of the city and to get the immense passenger traffic, offered by the East river ferries and the great railroad

depots. It was not so unjust a discrimination for the legislature to make against a railroad company, standing equipped and designing to enter upon that profitable territory at once. If a previously existing burden seemed to be expressly continued by the legislative provision, the company dealt with the commissioners and the city authorities with full knowledge. The company plainly enough understood that the obligation continued and was most willing to accept the few new conditions demanded. It evidently did not see any of that inconsistency in the city's holding it to its obligation, which is now commented upon. It did not consider the burden an unequal one to bear, or an unjust or illegal one; for it hastened to construct under the power given, and, upon completion, commenced and continued to pay the percentage upon income for upwards of twelve years afterwards. The conduct of the company in paying this percentage to the city, subsequently, is a feature of the case of too serious an importance, as a practical construction placed upon the section by the parties, to be disregarded. It might not avail, if there was no foundation in the statute for a liability, to create one; but it proves, in a debatable case, what the parties understood to be the nature of their legal relations, and that the burdened party deemed itself under, and was willing to accept of, the burden. It is plain that the present contention is a theory, devised in after years to defeat this obligation to the city. Shall we refine away by logical subtlety what was the practical view taken by the parties of the agreement and of their contractual relations? If we do that, will we feel any confidence that we have taken the correct and just view of their engagements? It seems to me that we should put away impressions. We should accept the co-temporaneous construction as given by the parties and which is directly antagonistic to the present claim. It seems to me undeniable that in so doing we shall accomplish that exact justice, which is demanded and expected of this court, and which it has aimed always to mete out.

I am unable to see the force of the argument of an unfair

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discrimination. The only other company is the Gilbert, or Metropolitan, and, as between it and the New York Company, a legislative discrimination existed always. The former company, when incorporated in 1872 (five years after the West Side, etc., Company), had no percentage burden imposed upon it. It is no answer to say that there is a discrimination worked by continuing the burden, when it is plain, upon the face of the act, that the New York Company was intended to be discriminated against, in respects to which I have alluded.

For the reasons thus generally stated, I think the judgment below was right and should be affirmed, with costs.

BARTLETT, J. (dissenting). I agree with Judge GRAY. The reversal of this judgment is a great injustice to the city of New York.

I find it impossible to read the Rapid Transit Act of 1875, in the light of the proceedings which have taken place under it, without coming to the conclusion that its object was not only to circumvent the Constitution, under the guise of a general law, which prohibits the legislature from passing a private or local bill granting to any corporation, association or individual the right to lay down railroad tracks, and that its further design was to secure to existing corporations, by indirection, franchises of vast value. It is urged in the prevailing opinion that it is impossible that the legislature meant to discriminate in favor of or against any road coming under the act. This suggestion springs from the fact that the Metropolitan or Sixth Avenue line is not subject to the tax of five per cent. The answer is that the legislature when it enacted the thirty-sixth section of the Rapid Transit Act presumably supposed it was dealing with the subject of allowing an existing corporation to connect its line with railway depots and ferries, and so it declared that said corporation might construct such connection with all the rights and with like effect as though the same had been a part of the original route of such railway. Had the New York Elevated Railroad Company, in pursuance of this authority and under a reasonable construc-

tion of the statute, built spurs or branches to various ferries and depots, the said thirty-sixth section contemplated that its increased earnings would be subject to the five per cent tax precisely the same as if such connections had been a part of the original route. It certainly was not within the contemplation of the legislature that the brief and general phraseology of this thirty-sixth section would confer upon the New York Elevated Railroad Company the right to construct an elevated railway system from South ferry through the Bowery and Third avenue to Harlem, running blocks away from depots and ferries, embracing one of the most valuable franchises on Manhattan Island, and being in fact an independent line on the east side of the city. It is inconceivable, if such had been the legislative intent, that apt language would not have been employed in dealing with a matter of such paramount importance. The New York Elevated Railroad Company having, however, secured the right to construct and operate the Third Avenue line, as a connecting route to depots and ferries, under a strained and unnatural construction of the thirty-sixth section of the Rapid Transit Act, it follows that the company and its successors in interest are estopped from denying that such connecting route is a part of the original route of its railway. This being so it follows that the net earnings of the Third Avenue line are just as much subject to the five per cent tax as those of the Ninth Avenue line.

There is every reason why this tax should be paid; there has been waiver on the part of the company by years of payment of the tax; there has been a practical construction of the statute in favor of the city's claim; and lastly the fair and reasonable reading of the thirty-sixth section of the Rapid Transit Act of 1875 requires it.

The judgment appealed from should be affirmed.

All concur with PECKHAM, J., except GRAY and BARTLETT, JJ., who read for affirmance, and ANDREWS, Ch. J., who concurs with them.

Judgment reversed.

THE HARLEM BRIDGE, MORRISANIA AND FORDHAM RAILWAY
COMPANY, Respondent, v. THE TOWN BOARD OF THE TOWN
OF WESTCHESTER et al., Appellants.

The parties hereto stipulated that the action be discontinued upon terms specified, the order of discontinuance to be without prejudice to a motion for extra allowance, and if allowance be granted and not paid, that defendants could move to vacate the order of discontinuance *ex parte*. Upon this stipulation an order of discontinuance was entered which recited that plaintiff had complied with all terms "except to the extra allowance to be hereafter disposed of." An order of Special Term granting an extra allowance was reversed by the General Term without considering the merits, on the ground, as appears by its order, that the court had no power after discontinuance to grant an extra allowance. *Held*, error; that the parties had power to enter into the stipulation and pursuant to it the motion for extra allowance was regular, and the General Term had power to review on the merits the order granting it.

(Argued June 4, 1894; decided June 12, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 12, 1894, which reversed orders of the Special Term granting motions by defendants for leave to renew motion for extra allowance on discontinuances of action and granting said allowances.

The nature of the action and the facts, so far as material, are stated in the opinion.

Alfred B. Cruikshank for appellants. The order is appealable to this court. (*Mingay v. H. M. Co.*, 99 N. Y. 270; *H. R. T. Co. v. W., etc., Co.*, 135 id. 393.) The parties had the right by stipulation to modify as desired the force and effect of the order of discontinuance. (*In re N. Y., L. & W. R. R. Co.*, 98 N. Y. 447; *Hong Wang v. Cooper*, 114 id. 388; *Ward v. Ray*, 69 id. 96; *In re Hathaway*, 71 id. 238.) The fact that the stipulations were not recited in the moving papers makes no difference. (*Munoz v. Wilson*, 111 N. Y. 295; *Moore v. Williams*, 115 id. 586; *Bank v. Emeric*, 2 Sandf. 718.) An extra allowance was proper. (*Danenhoven v. March*, 4 Abb. Pr. 254; *Coffin v. Coke*, 4 Hun, 616.)

There was a sufficient basis on which to compute the allowance. (*A. D. Co. v. Libby*, 45 N. Y. 499; *O., etc., Co. v. V., etc., R. R. Co.*, 63 id. 176; *Weaver v. Ely*, 83 id. 89; *Conaughty v. S. C. Bank*, 92 id. 401; *Mingay v. H. M. Co.*, 99 id. 270; *H. R. T. Co. v. W. T. & R. Co.*, 135 id. 393.) The practice of defendants on renewing their motions were regular. (*Fowler v. Huber*, 7 Robt. 52; *Bolles v. Duff*, 56 Barb. 567; *Crocker v. Crocker*, 1 Sheld. 274.)

Henry L. Scheuerman for respondent. There is no subject-matter involved in this action shown to have any value upon which any allowance can be computed. (*People v. U. & D. R. R. Co.*, 128 N. Y. 240; *People v. G. V. C. R. R. Co.*, 95 id. 666; *In re T. F. S. R. R. Co.*, 102 id. 343, 351; *In re Application of R. E. R. R. Co.*, 123 id. 351, 358; *Ferguson v. Hubbell*, 97 id. 507; *Conaughty v. S. C. Bank*, 92 id. 401; *People v. N. Y., etc., Co.*, 68 id. 71; *H. Ins. Co. v. G. Ins. Co.*, 138 id. 252; *O., etc., Co. v. V., etc., Co.*, 63 id. 179; *A. D. Co. v. Libbey*, 45 id. 499; *People v. N. Y. & S. I. F. Co.*, 68 id. 72; *Coleman v. Chauncey*, 7 Robt. 578; *Lyon v. Belford*, 8 Civ. Pro. Rep. 229; *Stevens v. C. E. Bank*, 3 Hun, 147.)

BARTLETT, J. This is an action for an injunction to prevent the defendants from interfering with the plaintiff from building and operating its street surface railroad, and to prevent defendant traction companies from building their own roads upon certain highways in Westchester, over which plaintiff claimed exclusive rights under its charter. After the action had been pending for some months a motion was made to discontinue it, by plaintiff, which was granted by order entered March 7th, 1893, the order reciting that it appeared the plaintiff had complied with all terms "except to the extra allowance to be hereafter disposed of." This had reference to a stipulation made the day before (March 6th, 1893) to the effect that the entry of the order of discontinuance should be without prejudice to the motion for an extra allowance, then

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pending, and that if the extra allowance was granted and not paid, defendants could move to vacate the order of discontinuance *ex parte*. On the 16th of May, 1893, Mr. Justice PATTERSON of New York, sitting at Special Term, granted to the Town Board of the town of Westchester, and certain other defendants, an extra allowance of five hundred dollars. From this order the plaintiff appealed, and the General Term refused to consider the appeal on the merits and reversed the order, for the alleged reason, as appears by the order, that the court had no power, after the action had been discontinued, to entertain a motion for an extra allowance. The defendants interested appeal from this order. We think it was competent for the parties to enter into the stipulation they did for the conditional discontinuance of this action. This court has repeatedly held that parties may enter into any stipulation not unreasonable and not against good morals or sound public policy. (*Matter of N. Y., L. & W. R. R. Co.*, 98 N. Y. 453, and cases there cited.) The motion for an extra allowance was, therefore, regular, and the General Term had full power to consider on the merits the appeal from the order made by the Special Term.

We are urged by the respondent to consider the question of the extra allowance on a ground not resting in the discretion of the Supreme Court, viz., was there any subject-matter involved in this action which was shown to have a value, upon which an allowance could be computed? We do not think this question is properly before us on this appeal, as the only point presented for our consideration is whether the General Term possessed the power to review the order of the Special Term on the merits.

For the reasons already stated, we are of opinion that the order appealed from should be reversed.

Order appealed from reversed, with costs, and case remitted to General Term for its action upon the appeal from the Special Term.

All concur.

Ordered accordingly.

THE PEOPLE ex rel. ANNIE M. HOFFMAN, Appellant, v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK et al., Respondents.

“The imposition of a fine is a species of punishment, and before any body, tribunal or officer can impose it, authority so to do must be clearly found in some statute.

“The provision of the New York Consolidation Act (Chap. 410, Laws of 1882) giving to the board of education “full control of the public schools, and the public school system of the city, subject only to the general statutes of the state upon education,” does not give to that board power to impose a fine upon a teacher, either payable in money or by forfeiture of salary for a specified period, for violating the orders of the superintendent, or *it seems*, for any misconduct or dereliction, in the absence of any by-law, rule or regulation known or assented to by the teacher providing for the imposition of such a fine.

(Argued June 4, 1894; decided June 12, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 31, 1886, which confirmed the proceedings and final determination of the board of education of the city of New York imposing a fine upon the relator, which proceedings were brought up for review by writ of certiorari.

The relator, who was the principal of one of the public schools in the city of New York, was charged by the parent of one of the pupils with improper conduct during the examination of said pupil, and with having so discriminated against her as to obtain an improper result of the examination and to prevent her promotion. The committee to whom the matter was referred reported adversely to the relator, and upon such report a new examination was ordered under the direction of the city superintendent of schools; the latter suggested to the relator that she should not be present during such examination. She was present, however, before it commenced and brought the pupil for whose benefit the re-examination had been ordered from the back to the front row of seats and cautioned the class teacher to watch her and make sure she

did not copy from the other pupils, as she had twice caught her doing on the prior examination. The city superintendent found that said pupil was not qualified to be promoted. The committee reported that the relator was guilty of discourtesy, and proposed that she should be fined fifteen days' pay for disobeying the instructions of the city superintendent by being in the room prior to the examination and interfering with said pupil. This report was adopted by the board of education, the fine imposed being deducted from her salary.

There was no by-law, rule or regulation of the board of education known or assented to by the relator under which a fine could be imposed upon her.

Henry Schmitt for appellant. The board of education had no power to impose the fine and to withhold the salary of the appellant. (Laws of 1882, chap. 410, §§ 272, 440, 1038, 1042.) The board did not have as an incidental right the power to fine. (*Morton v. Mayer*, 140 N. Y. 213.) The board of education had no jurisdiction of the complaint of Mr. Luyster, and could not take action on it except to refer it to the trustees of the ward in which the school was located. (Laws of 1882, chap. 410, §§ 1027, 1029, 1035, 1072.) The fine was a forfeiture of past salary. The board had no power to create such a forfeiture. No by-law had ever been made to authorize the imposition of the fine or forbidding the act charged against relator. (Dillon on Mun. Corp. [4th ed.] 85, § 49; 1 id. § 322; *Hooper v. School Comrs.*, 43 Ala. 598; *Buchanan v. School District*, 25 Mo. App. 85; *Rudy v. School District*, 30 id. 113; *Hart v. Mayor*, 9 Wend. 571, 588; *White v. Tallman*, 2 Dutch. [N. J.] 67; *Mayor v. Ordeman*, 12 Johns. 122; *Dunham v. Rochester*, 5 Cow. 462; *Cotter v. Doty*, 5 Ohio, 398; *Taylor v. Carondelet*, 22 Mo. 105; *R. S. Co. v. Jersey City*, 45 N. J. L. 246.)

R. G. Beardslee for respondents. The action of the board of education in imposing the fine upon the relator, as principal of the school, was had under the power conferred upon said

board by statute. (Laws of 1882, chap. 410, §§ 1022, 1026, 1028, 1035; *In re Gleese*, 18 J. & S. 480.) The imposition by the board of education of a fine upon a teacher, for misconduct, is within the reasonable limits of the administration by said board of the public school system of the city. (*Burdick v. Babcock*, 31 Iowa, 565; *People ex rel. v. Bd. Education*, 32 How. Pr. 167; *People ex rel. v. Bd. Education*, 20 J. & S. 520.) The city superintendent acted under the instructions given to him by the committee on teachers of the board of education, made in pursuance of the authority of the committee conferred by said board, by the reference thereto of the complaints against and the communication from the relator; and he also acted under the powers conferred upon him by statute. (Laws of 1892, chap. 410, §§ 1027, 1040.) The board of education had legislative and discretionary power to impose said fine. (*People ex rel. v. Bd. of Education*, 3 Hun, 177; *People ex rel. v. Police Comrs.*, 93 N. Y. 97; *People ex rel. v. Bd. of Fire Comrs.*, 96 id. 644; *People ex rel. v. Comrs. of Public Parks*, 97 id. 37; *People ex rel. v. Fire Comrs.*, 100 id. 82; *People ex rel. v. Bd. of Fire Comrs.*, 106 id. 257; *People ex rel. v. French*, 110 id. 494; *People ex rel. v. French*, 123 id. 636; *People ex rel. v. Bd. of Suprs.*, 131 id. 468, 471; *Mechem's Public Offices and Officers*, §§ 945, 972.)

EARL, J. The relator was principal of one of the public schools in the city of New York, and she was fined by the board of education "fifteen days' pay for disobeying the instructions of the city superintendent;" and she instituted this proceeding by certiorari to review and reverse the imposition of that fine. She claims that the board had no authority to impose the fine, and in this we think she is clearly right.

The imposition of a fine is a species of punishment, and before any body, tribunal or officer can impose it, authority therefor must be clearly found in some statute.

Sections 1022 and 1026 of the New York City Consolidation Act of 1882 provide that the board of education "shall

have full control of the public schools and the public school system of the city, subject only to the general statutes of the state upon education ;" and this is the sole provision of law invoked by the respondents as authority for the imposition of the fine. Under it the board of education may establish schools, regulate the course of instruction therein, and shape the entire educational system for the city. It may provide for the discipline and government of the scholars in the schools. But could it impose pecuniary fines upon them for any misconduct or dereliction, and thus deprive them of their property? Could it imprison them or sit in solemn judgment upon them and order the infliction of corporeal punishment? If it could not do these things, much less could it discipline or punish teachers in these ways. The relator never in any way submitted herself to such a jurisdiction, and there is no general law which confers it. If the board could thus deprive her of fifteen days' pay, where is the limit? Why could it not deprive her of one month's pay or a whole year's salary already earned? If it could compel her to forfeit money already earned, why could it not enforce a fine against her other property? If the board has such a power, where are its limits and who is to define them?

If the board had adopted by-laws for the regulation of the schools and the teachers therein, and the relator had assented to them, then they might have become binding upon her as part of her contract with the board, and under such by-laws it might have had power of discipline and control over teachers which it could not otherwise have or possess. But here there was no by-law, rule or regulation known or assented to by the relator under which any fine could be imposed upon her. The board of education can, under certain conditions mentioned in the laws, remove teachers, and by the exercise of that power it can protect the schools against the incompetency and the improper conduct of teachers.

The board of education is a *quasi* municipal or governmental corporation, and no such corporation has power to impose fines or to pass ordinances authorizing the imposition

of fines without the clear authority of some statute. In *Dillon on Municipal Corporations*, secs. 345 and 348, it is said: "A corporation, under a general power to make by-laws, cannot make a by-law ordering a forfeiture of property. To warrant the exercise of such an extraordinary authority by a local and limited jurisdiction, the rule is reasonably adopted that such authority must be expressly conferred by the legislature." "In this country, inasmuch as corporations derive all their power from charter or act of the legislature, the right to inflict a forfeiture must be plainly given, and cannot be derived from usage." In *Kirk v. Nowill* (1 T. R. 124) the question was whether a corporation which possessed a general power to make by-laws could make a by-law creating a forfeiture, and Lord MANSFIELD held that no corporation possessed such an extraordinary power unless it was expressly given; and Mr. Justice BULLER also said that construing it a by-law creating a forfeiture, the act of Parliament not having given the corporation power to make such a by-law, it was bad on that ground; and a similar doctrine was laid down in *Hart v. Mayor, etc.* (9 Wend. 571, 588), and *Dunham v. Rochester* (5 Cow. 462), and in many other cases. This fine was in the nature of a forfeiture, if valid, as it compelled the relator to forfeit a portion of her salary earned.

As this fine was imposed upon the relator without authority it could do her no harm, and could not stand in the way of the collection by her of her salary as a teacher, and, therefore, it may well be doubted whether she could properly institute this proceeding by certiorari to review and reverse the utterly void and harmless proceeding of the board of education. But as this proceeding was entertained in the court below, and no objection has been made to its propriety, we will assume that it was proper; and our conclusion is that the order of the General Term and the proceeding of the board of education imposing the fine should be reversed and set aside, with costs to the relator in this court and the court below.

All concur, except PECKHAM and GRAY, JJ., dissenting.

Ordered accordingly.

In the Matter of the Proceedings of the LONG ISLAND RAILROAD COMPANY, Respondent, to Acquire Title to the Real Estate of CHARLES MORAN, Appellant.

The charter of a railroad corporation may not be annulled, or held forfeited in part, because of a violation by it of a private contract.

So, also, the fact that such a corporation, propelling its cars by steam, has, by virtue of a private contract, surrendered the right to use steam on a small portion of its route, and that it has violated this contract, is no defense in proceedings instituted by it to condemn lands required and shown to be necessary for its corporate purposes.

The company's corporate rights of eminent domain are unaffected by the breach of contract, and may still be exercised in a proper case.

Where, therefore, in such proceedings it appeared that the petitioner, prior to 1859, was lawfully running its trains along an avenue in the city of Brooklyn; that, pursuant to the provision of the act of that year (Chap. 484, Laws of 1859) providing for the relinquishment of its right to use steam power within the city, it entered into a contract with the city, by which it surrendered such right in consideration of a sum paid to it, which was raised by assessment upon property benefited, and thereafter the common council of the city adopted a resolution authorizing the use of steam in running cars on said avenue, and the legislature passed an act (Chap. 187, Laws of 1876) authorizing the petitioner to run cars over its road on the avenue by steam power, whereupon the petitioner resumed the use of steam power on the avenue, *held*, that the question of the constitutionality of the act last mentioned was not presented; that if unconstitutional and the use of steam power on the avenue illegal, this was no defense to the proceedings.

(Argued June 5, 1894; decided June 12, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made September 12, 1892, which affirmed an order of Special Term appointing commissioners of appraisal in condemnation proceedings. The proceedings in question were instituted under the General Railroad Act of 1850 (Laws of 1850, chap. 140) by the petitioner, a steam railroad corporation, to acquire title to land in the city of Brooklyn for a freight depot. The petition alleged that the petitioner had been and is engaged in operating as lessee the Atlantic Avenue railroad, along Atlantic avenue, in said city, by steam power.

It appeared that in 1859 the Brooklyn and Jamaica Railroad Company and the Long Island Railroad Company, the petitioner, were running their trains up and along Atlantic avenue with the full authority and consent of the state and the city. In that year the legislature passed an act (Laws of 1859, chap. 484) to provide for the closing of the tunnel of the Long Island Railroad Company, in Atlantic street, and for the relinquishment by said company of its right to use steam power within the city of Brooklyn. The act authorized the common council, upon the petition of a majority of landowners within the district of proposed assessment, to apply to the Supreme Court for the appointment of three commissioners who should be empowered to contract with said companies to relinquish the use of steam within the city limits in consideration of a payment not exceeding \$125,000, which sum was to be raised by assessment upon property benefited within a certain specified area. The act provided that upon the confirmation of the report of the commissioners the right of the two companies to use steam power within the city limits should end, and repealed, as of that date, all laws conferring such right. The contract was made accordingly, the assessment levied, and the money collected and paid, and the right to use steam surrendered. The road was thereafter operated by horse power until 1876, a period of about sixteen years. In that year the common council adopted a resolution permitting and authorizing the use and operation of steam and steam locomotives and cars on Atlantic avenue, between Flatbush avenue and the city line, by the Atlantic Avenue Railroad Company or any railroad company acquiring by lease or otherwise the right so to use and operate the railroad on such avenue. In the succeeding month the legislature enacted that it should be lawful for the Atlantic Avenue Company and the Long Island Company, as its lessee, to run cars over the road on the avenue, from the city line to Flatbush avenue, by steam power, subject to such rules and regulations as the city of Brooklyn might prescribe. (Laws 1876, chap. 187.) Immediately after

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the passage of this act the Atlantic Avenue road resumed the use of steam power, and in 1877 the Long Island Company, having leased said road, re-laid the track with heavier rail and better suited for the use of locomotives, and thereafter moved its trains by steam.

The appellant, whose real estate is sought to be acquired, claims that the act of 1876 authorizing the use of steam on said avenue, is unconstitutional, and that the proceedings were instituted without legislative warrant.

John M. Bowers for appellant. The Long Island Railroad Company was a party to the legislation and to the contract in question, and is bound thereby. (Laws of 1859, chap. 444; *D. College v. Woodward*, 4 Wheat. 518; *B. S. T. Co. v. City of Brooklyn*, 78 N. Y. 531; *W. F. Co. v. O. & M. R. Co.*, 142 U. S. 396; *Litchfield v. Vernon*, 41 N. Y. 123.) The legislation and contracts forbidding the further use of steam power upon Atlantic avenue, in the city of Brooklyn, were lawful. (*Brown v. Mayor, etc.*, 63 N. Y. 239; *W. Co. v. Bank of British Columbia*, 119 U. S. 191; *R. R. Co. v. Richmond*, 96 id. 521.) As against a property owner who paid his assessment under the terms of such legislation and contracts, the act of the legislature of 1876, restoring the right to use steam power upon that avenue, was unconstitutional and void, as impairing the obligation of a contract. (*University v. People*, 99 U. S. 309; *Merewether v. Garrett*, 102 id. 514; *Lahr v. M. E. R. Co.*, 104 N. Y. 282; *Newton v. Comrs.*, 100 U. S. 528.) If such act be unconstitutional and void, then as against the appellant, the Long Island Railroad Company has no lawful right to operate its railroad by steam on Atlantic avenue in the city of Brooklyn. (*In re Cheeseboro*, 78 N. Y. 232; Laws of 1859, chap. 384, § 3.) Having no lawful right to operate its road by steam on Atlantic avenue, it cannot avail itself of the statute authorizing railways lawfully operated to condemn private property. (*Miller v. Brown*, 56 N. Y. 383; *B. S. T. Co. v. City of Brooklyn*, 78 id. 531; *Vick v. City of Rochester*, 46 Hun, 607.) The

lands sought to be condemned are not contiguous to other property of the petitioner. (Laws of 1869, chap. 237; Laws of 1877, chap. 224; Laws of 1881, chap. 649; *R. R. Co. v. Gunnison*, 1 Hun, 496; *Bird v. W. & M. R. Co.*, 8 Rich. Eq. [S. C.] 46; *Akers v. U. N. J. R. Co.*, 43 N. J. L. 110; *P. R. Co.'s Appeal*, 93 Penn. St. 150.) The order appealed from is a final order in a special proceeding, and is appealable to this court. (Code Civ. Pro. § 190, sub. 3; *R. & S. R. R. Co. v. Davis*, 43 N. Y. 47; 55 id. 148; *In re L. I. R. R. Co.*, 45 id. 368.)

E. B. Hinsdale for respondent. The objections to the form of the petition were not well taken. (*P. P. & C. I. R. R. Co.*, 67 N. Y. 371, 377; *W. S. R. R.*, 64 How. Pr. 216; *S. R. T. Co.*, 38 Hun, 553; *M. E. R. R. Co.*, 12 N. Y. Supp. 502, 506.) The objection that the premises in question were not contiguous to the petitioner's railroad was not well taken. (Laws of 1881, chap. 649; *N. Y. C. R. R. Co. v. Gunnison*, 1 Hun, 496.) There is no force in the objection that the petitioner has not the right to operate its railroad in Brooklyn by steam power. (*People v. L. I. R. R.*, 9 Abb. [N. C.] 181; 30 Hun, 510; 89 N. Y. 75; *People v. B., F. & C. I. Co.*, 89 N. Y. 75; *Newton v. Commissioners of Mahoning*, 100 U. S. 548; *B., etc., R. R. Co. v. B. S. R. R. Co.*, 11 N. Y. 132; *S. R. T. Co. v. Mayor*, 128 id. 510; *P. Church v. New York*, 5 Cow. 538; *Britton v. Mayor*, 21 How. Pr. 251; *In re Lee*, 21 N. Y. 9; Cooley on Const. Lim. § 340; *In re B. E. R. Co.*, 125 N. Y. 434, 440.) This is a proceeding *in rem*, and if there is any force in the contract not to use steam on the avenue it is a personal contract of the appellant and does not attach to the lands as land. (*People v. B., F. & C. I. R. Co.*, 89 N. Y. 75.)

FINCH, J. I do not think that the question argued at the bar, and which was reserved and left undecided in *People v. Brooklyn, F. & C. I. R. Co.* (89 N. Y. 83), is even yet presented in a form to justify our final determination. That

question is whether the landowners on Atlantic avenue who paid assessments under an alleged contract for the discontinuance of steam propulsion upon that avenue, acquired a right which the legislature could not take away, and which makes the use of steam power upon that portion of petitioner's line unlawful. If we were to admit the alleged fact and should hold that the Long Island Co. had lost its right to use steam on the avenue end of its line, both under its own charter and as lessee, it would furnish no adequate answer to the present application. The petitioner would yet remain a steam railroad company, having possession of its charter and the rights secured thereby, using steam upon many miles of track, and doing so legally and by competent authority, and so at liberty to condemn land for its corporate purposes. Whether it may or may not use steam upon a small fraction of its line is a question irrelevant to its power of condemnation. That power remains until the charter is forfeited or annulled. If the company has become bound to use horses, or compressed air, or electricity upon a part of its line it may still need accommodation for freight, and the handling of cars and further terminal facilities, and there is no proof before us that the necessity existing rests or depends upon the ability to use steam upon the avenue end of the line. The evidence is that the company runs four hundred trains a day, and that its terminal facilities are so insufficient as to compel an occupation of Flatbush avenue by its cars, and nothing indicates that the pressure for room would be materially lessened if some motive power other than steam should be substituted in the city streets. At all events, until it is proved that the added accommodation sought is only necessary while steam is exclusively used, the fact that it cannot be lawfully used upon a few miles of track is no answer to a justified demand for the condemnation of further land. Corporate charters are not forfeited in fragments, or annulled as damages for the violation of private contracts. The argument of the learned counsel for the appellant is strongly framed until it reaches this fatal point. As to that the authorities which he cites are either irrelevant to

his purpose or adverse to the current of his reasoning. *Brooklyn Steam Transit Co. v. Brooklyn* (78 N. Y. 531) shows that the corporate life and power, once fully granted and completely existing, may be lost in two ways: sometimes because the charter itself provides for self-executing causes of forfeiture which, whenever established, effect at once the corporate death; and sometimes where no such provisions exist, the forfeiture comes and can only come from a judicial decree at the suit of the state. This last remedy against the company has been tried and failed. The use of steam upon the avenue has been held to be lawful as against the intervention of the state; and so it follows that even if it be unlawful against contract rights of individuals the fact works no forfeiture, the corporation remains intact with no power crippled, since the wrong it has done, if it be a wrong, is neither a cause of self-executing forfeiture, nor a ground of destruction at the suit of the state. The company's corporate right of eminent domain, therefore, remains unaffected and may still be exercised when the proper occasion comes. In the *Whirlpool Railway Case* (108 N. Y. 375) it was held that a company seeking to exercise the power of condemnation must show, first, a legislative warrant for its act, and, second, that it is engaged in a railroad enterprise of a public character. In the present case both facts exist beyond dispute, and the power of condemnation is not destroyed by the incident that individuals through the force of a special contract with the company may compel the use of some motive power other than steam upon a small portion of the line. Other cases cited on behalf of the appellant were those in which some express condition of the corporate life remained unfulfilled, or in which the rights of the company came in collision with and were subordinated to the police power of the state. The cases are very far from holding that a corporation loses its conferred right of eminent domain by merely breaking a private contract with a private individual.

The General Term opinion accedes to this view of the case but speaks of it as quite technical. For us and in this court

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it is much more than that, for it renders unnecessary and so improper a discussion of the constitutional question upon which the private right of the appellant turns. To decide that when after all the result must remain unchanged would be to violate a prudent and useful rule which governs our judicial action.

The appellant and those situated like him have apparently suffered an injustice. They paid their money to get rid of steam on the avenue and it has come back under legislative sanction. If there is a remedy, however, and a right has been violated, the redress must come through an enforcement of the contract and not by an attack upon the corporate life and power.

The order should be affirmed, with costs.

All concur.

Order affirmed.

SIMON PALTROVITCH, Respondent, v. THE PHOENIX INSURANCE
COMPANY of Hartford, Conn., Appellant.

The stipulations of a fire insurance policy which relate to the procedure merely in case of loss are to be reasonably, not rigidly, construed.

A policy of fire insurance contained a provision that in case of loss a certificate made by a magistrate or notary "living nearest the place of the fire" shall be furnished by the insured if required. A loss having occurred, the insured furnished, with the proofs of loss, a certificate of a notary, substantially in the form prescribed. The proofs of loss were kept by the company for twenty-three days and were then returned with a notice that the company required a certificate from the notary "living nearest the place of the fire," and that the one sent would not be accepted as a compliance with that requirement. No name of any notary living nearer than the one who made the certificate was given and no statement that there was any. In an action upon the policy, it appeared that there were three notaries who lived nearer, but each of them had his office and transacted his official business at a much greater distance. Where they boarded and slept they had no signs, and there was nothing to indicate their presence. Plaintiff was unaware of their proximity, and took the nearest notary he could find whose office and notarial sign and residence were at the same place. *Held*, that the phrase quoted should not be confined entirely to the place where the notary slept and ate, but should take account of the place where he

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lived officially and to which by some public sign he invites those who do business with him; and that in any event, good faith required of the defendant in raising the objection to give the name and address of a notary living nearer, and not having done so, the jury were justified in concluding that it did not in reality require the certificate for any practical or beneficial purpose, but had waived it as an essential condition. Reported below, 68 Hun, 304.

(Argued June 7, 1894; decided June 19, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 28, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This was an action upon two policies of insurance issued by defendant upon a stock of goods, household goods and furniture belonging to plaintiff.

The facts, so far as material, are stated in the opinion.

C. M. Bushnell for appellant. The insertion in the policy of the clause providing for the certificate of the magistrate or notary was made compulsory upon the defendant by chapter 486, Laws of 1886, and, therefore, cannot be considered harsh or unconscionable. (*Quinlan v. P. W. Ins. Co.*, 135 N. Y. 356-365.) The failure of the plaintiff to procure the certificate of the magistrate or notary living nearest the place of the fire, after being duly required so to do by defendant, prevents a recovery upon the policies. (*O'Neil v. B. F. Ins. Co.*, 3 N. Y. 122-128; *Lane v. S. P. F. & M. Ins. Co.*, 50 Minn. 227; *Jones v. H. Ins. Co.*, 117 N. Y. 103.) It cannot be claimed that the defendant waived its right to require the production of the certificate required by the terms of the policy, by retaining the certificate attached to the statements of loss for twenty-three days, for the reason that the certificate which the assured is required to furnish only if required, and the statement of loss which he is required to render if fire occur, are clearly separate and distinct instruments. (*Lane v. S. P. F. & M. Ins. Co.*, 50 Minn. 227; *Daniels v. E. Ins. Co.*, 50 Conn. 551; *Brown v. H. F. H. Ins. Co.*, 52 Hun, 260-266; 132 N. Y. 539.) Neither can it be claimed that the examination

of the assured under the policies constituted a waiver of defendant's right to insist upon the certificate. (*Conway v. P. L. M. Ins. Co.*, 140 N. Y. 79; *Weed v. L. & L. F. Ins. Co.*, 116 id. 106.)

Moses Shire and Edward L. Jellinek for respondent. The failure of the plaintiff to furnish an additional certificate of a notary was not fatal to a recovery. (*McNally v. P. Ins. Co.*, 137 N. Y. 398; *May on Ins.* [3d ed.] 217; *Hinman v. H. F. Ins. Co.*, 36 Wis. 156; *McLaughlin v. W. C. M. Ins. Co.*, 23 Wend. 525; *Griffey v. N. Y. C. Ins. Co.*, 100 N. Y. 417; *Kratzenstein v. W. A. Co.*, 116 id. 54; *Hoffman v. A. Ins. Co.*, 32 id. 405; *Turley v. N. A. F. Ins. Co.*, 25 Wend. 374.) The defendant's retention of the proofs of loss and certificate of notary for twenty-three days waived their right to further or more perfect proofs or certificate. (*Keaney v. H. Ins. Co.*, 71 N. Y. 396; *Jones v. H. Ins. Co.*, 117 id. 103.) The examination of the plaintiff after the receipt of the proofs of loss was a recognition of the validity of the policies, and the defendant thereby waived even a previous right to insist upon a forfeiture thereof. (*Titus v. G. F. Ins. Co.*, 81 N. Y. 418, 419; *Carpenter v. G. A. Ins. Co.*, 47 N. Y. S. R. 865.)

FINCH, J. The loss by fire which the plaintiff seeks to recover occurred in the city of Buffalo on the eleventh day of May, 1891. The insured made out and forwarded his proofs of loss, which reached the defendant company on the 15th of the following June. Accompanying such proofs of loss was a certificate in the substantial form required by the policy, which was signed by A. J. Roehner, a notary public. The policy provides that such a certificate made by the magistrate or notary "living nearest the place of the fire" shall be furnished by the insured if required. No such requirement had been made when the proofs of loss were sent, but the certificate was furnished voluntarily and in advance to meet the emergency of a possible demand for it. The proofs of loss were kept until the 8th day of July by the company and then

returned to the insured with a notice that the company required a certificate from the notary "living nearest the place of the fire," and that the certificate furnished would not be accepted as a compliance with the policy. There was no statement that other notaries were found to be living nearer the place of the fire, and stating their names and residences, as good faith and a moderately fair treatment of the insured required, but he was left to carry on his own investigations about notaries in his own way and at his own risk. It turned out that three other notaries lived nearer the place of the fire in one sense of the phrase. This company, in its anxiety for its precise and rigid rights, hired a city engineer to measure the distances with a tape, and both by way of the streets and in an air line over the tops of the houses, and so was able to prove that there were three notaries who boarded and slept a few hundred feet nearer the place of the fire than the one whom the insured supposed to be the nearest. But these later-discovered notaries had their offices and transacted their official business at much greater distances away, and there had their signs and expected their customers. Where they boarded and slept they had no signs, and there was nothing to indicate their presence and existence; and the plaintiff, unaware of their proximity, and not suspecting the sort of investigation to which he was to be invited, took the nearest one he could find whose office and notarial sign and residence were at the same place. It is upon this narrow and technical ground, with no pretense of substantial justice in it, that the action of the insured is now defended.

We have recently held, and I think very properly, that the stipulations of a policy which relate to the procedure merely, after the occurrence of a loss, are to be reasonably and not rigidly construed (*McNally v. Phoenix Ins. Co.*, 137 N. Y. 398), and I think that the phrase "living nearest the place of the fire" ought not to be confined entirely to the food and sleep of the notary and should take account of the place where he lives officially and to which by some public sign he invites those who do business with him (*Turley v. N. Am.*

Fire Ins. Co., 25 Wend. 374); but at all events good faith on the part of the company requires that when they reject one certificate on the ground that there is a nearer notary whose certificate they require, they should give the name and address of that nearer notary to enable the insured to comply with their demand, and that if they do not do so a jury will be justified in concluding that they do not in reality require the further certificate for any practical or beneficial purpose, but have waived it as an essential condition. For they either want another notary's certificate or they do not. If they desire it they will name him so that the insured may comply. Otherwise, it is clear that they do not want the further certificate, and will be disappointed if they get it, and make the demand solely and only to secure a technical defense. When to that is added the fact that the company kept the certificate sent for twenty-three days without objection, I think the jury were justified in saying that the demand of a further certificate was not made in good faith and a different performance of the condition was waived.

A suggestion was made to induce a favorable view of the technical point raised. It is said that the evidence justified a suspicion of fraud. None was alleged except a very exaggerated estimate of the loss and that the jury corrected by their verdict. It is always easy to say that the company suspects as a reason for a purely technical defense. All parties should have their rights in this court fairly and fully, but a severely formal defense resting wholly upon immaterial matters of procedure ought not to be allowed to work injustice.

While we feel bound to enforce these contracts fully and fairly according to their terms, yet where those terms respect the modes of proof and procedure after the loss, we shall give them always a reasonable and liberal construction and not a severe and technical one. In this case we approve of the conclusions reached by the courts below.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

PATRICK MURPHY, Appellant, v. DENNIS SHEA, Respondent.

To make competent proof of the service of a summons the affidavit of the person who made the service is not necessary; the affidavit of a third person, who swears unequivocally and positively to the service, is sufficient. The presumption from such an affidavit is that the affiant swears from personal knowledge, not from hearsay.

In an action to compel specific performance by the vendor of a contract for the sale of land, it appeared that plaintiff acquired title on sale under a judgment in a foreclosure suit, one of the defendants in which was an infant. Plaintiff here claimed that the summons was not served on said infant, and so his interest was not cut off by the foreclosure judgment. The judgment roll was put in evidence; it contained a petition, entitled in the action, signed and verified by the father of the infant, which stated that the summons and a copy of the complaint were served upon the infant "on the — day of September" in the year stated. The petition prayed for the appointment of a guardian *ad litem* for the infant. Such a guardian was appointed; he appeared in the action and put in the usual answer of such a guardian. *Held*, that the judgment roll contained sufficient and competent evidence of service of the summons.

Defendant put in evidence certain papers used by him on a motion in the foreclosure suit that he be relieved from the purchase on the ground that the infant had not been served with the summons. Among them was an affidavit of the father to the effect that he was mistaken in his former affidavit, and that the infant was not served, but was at the time of the alleged service out of the state. The motion was denied. *Held*, that if the fact of the service could be traversed in this action the later affidavit was not conclusive, but the question was one of fact to be determined by the trial court, and it having found that the guardian *ad litem* was duly appointed and that defendant's title was good, this included, if necessary to sustain the judgment, a finding that the summons was served.

(Argued June 8, 1894; decided June 19, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made May 8, 1893, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Special Term.

This was an action for the specific performance of a contract for the purchase of land.

The facts, so far as material, are stated in the opinion.

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William A. Dykman for appellant. The court can acquire jurisdiction over an infant only by a service of summons. Personal service of a summons on a minor under fourteen years of age must be made by delivering a copy to the minor and also to his father. (Code Civ. Pro. § 426.) Without personal service the court is without jurisdiction to appoint a guardian *ad litem*, and the appearance by the guardian is not the appearance by the infant. (*Crouter v. Crouter*, 133 N. Y. 55; *Ferguson v. Crawford*, 70 id. 253.) The interest of Francis X. Kennedy is not barred by the Statute of Limitations. (Code Civ. Pro. § 375.) There should have been judgment in plaintiff's favor for damages, and the measure of damages should have been the return of \$500 paid on account and \$150 expended in the examination of the title. (*Sternberger v. McGovern*, 56 N. Y. 12.)

Edward W. S. Johnston for respondent. This is a collateral attack upon a judgment roll. The judgment roll sets forth facts which are in all respects sufficient to confer jurisdiction upon the court over the infant, Francis X. Kennedy. (*Fuchs v. Devlin*, 35 N. Y. S. R. 807; *McMurray v. McMurray*, 66 N. Y. 175; *Crouter v. Crouter*, 133 id. 55; *Bolton v. Schriever*, 135 id. 65; *Roderigas v. E. R. S. Inst.*, 63 id. 460; *Monell v. Dennison*, 8 Abb. Pr. 401; *Bolton v. Brewster*, 37 Barb. 389; *Bumstead v. Reed*, 31 id. 661; *In re Hammersley*, 9 Civ. Pro. Rep. 293; *McCarthy v. Marsh*, 5 N. Y. 263; *Porter v. Purdy*, 29 id. 106; *People v. Waldron*, 51 How. Pr. 221; *Kinnier v. Kinnier*, 45 N. Y. 535; *Fisher v. Bassett*, 9 Leigh, 119; *Andrews v. Avery*, 14 Gratt. 229; *Abbott v. Coburn*, 28 Vt. 667; *Burdett v. Silsbee*, 15 Tex. 615; *Gridley v. College of St. Francis Xavier*, 137 N. Y. 327; *Guilford v. Love*, 49 Tex. 715; *Johnson v. Beazley*, 65 Mo. 264; *Dequindre v. Williams*, 31 Ind. 444; *Erwin v. Lowry*, 7 How. [U. S.] 180; *Shroyer v. Richmond*, 16 Ohio St. 455; *Smith v. Hilton*, 50 Hun, 237; *Nelson v. Yates*, 37 id. 55; *Home v. Rochester*, 63 N. H. 648; *Devlin v. Com.*, 101 Penn. St. 276; *Emerson v. Ross*, 17 Fla. 122—

127; *Comstock v. Crawford*, 13 Wall. 403; *Arnold v. Arnold*, 62 Ga. 627; *Quidorts v. Pergeaux*, 18 N. J. Eq. 472; *Bolton v. Jacks*, 6 Robt. 190; *Ferguson v. Crawford*, 70 N. Y. 253; *Guttendorf v. Goldsmith*, 83 id. 110; *Vilas v. P. & M. R. R. Co.*, 123 id. 440, 441; *Bosworth v. Vandewalker*, 53 id. 597; *Hopkins v. Frey*, 46 N. Y. S. R. 133.) The only questions that this court can consider are those of law, and the only question, therefore, before the court is whether there was any evidence of any character upon which the learned trial judge based his findings of fact. (*Ferguson v. Crawford*, 86 N. Y. 609; *Ogden v. Alexander*, 140 id. 356; Code Civ. Pro. §§ 992, 993; *Healy v. Clark*, 120 N. Y. 642; *Hollister v. Mott*, 132 id. 22; *Fischer v. Blank*, 138 id. 251; *Goodsell v. W. U. T. Co.*, 130 id. 446; *Rutherford v. Schattman*, 119 id. 604; *Crim v. Starkweather*, 136 id. 635; *Flack v. Village of Green Island*, 122 id. 108; *Day v. Town of New Lots*, 107 id. 149; *Prosser v. F. N. Bank*, 106 id. 677; *Hubbell v. Medbury*, 53 id. 98; *Syester v. Brewer*, 27 Md. 288; *Ottenger v. Strasburger*, 33 Hun, 466; 102 N. Y. 692; *Wolf v. Schmidt*, 19 N. Y. S. R. 780; *Howley v. Cramer*, 4 Cow. 717.) The court upon the complaint and the proof was justified in dismissing the complaint and did so as the only proper thing upon the facts disclosed herein. (*Beck v. Allison*, 4 Daly, 441; *Jacobs v. Morrison*, 136 N. Y. 101; *Huoes v. Dobbs*, 137 id. 465; *Miles v. D. F. I. Co.*, 125 id. 294; *Conger v. N. Y., W. S. & B. R. R. Co.*, 120 id. 29.)

PECKHAM, J. The plaintiff and defendant entered into an agreement by which the defendant agreed to sell and convey to the plaintiff certain real estate in New York city upon payment of a certain price. The plaintiff in his complaint alleges that he was ready at the appointed time to carry out his part of the agreement by paying the agreed-upon price, but the defendant neglected and refused to fulfill by conveying the fee of the premises, as there was an outstanding interest in the premises, or some portion thereof, which the defendant did not by his tendered deed convey. The plaintiff had paid

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five hundred dollars down at the execution of the agreement, and had expended \$150 in making searches, etc. He demanded a specific performance of the contract on payment of the balance of purchase money to the defendant, after making a just deduction from the amount due from him as purchase money, because his money had lain idle on account of defendant's failure to comply with the contract and give a good title. The defendant in his answer alleged full performance of his contract by tendering a good and sufficient deed to convey the fee simple of the entire premises. The defendant's title to the premises came through a foreclosure suit, in which there were infant defendants. It was claimed that one of such defendants had not been served with the summons, and that, hence, his interest (which was one-sixth) in the premises was not cut off by the foreclosure judgment and the sale thereunder to defendant. The plaintiff upon the trial offered the judgment roll in the foreclosure action in evidence. It contained a petition entitled in the foreclosure action, signed and sworn to by the father of the infant, in which the father swore that the summons and a copy of the complaint were served on the infant defendant on the — day of September in the year stated. He prayed for the appointment of a guardian *ad litem* for the infant defendant. Upon this sworn petition the court appointed a guardian who appeared in the action and put in the usual answer of a guardian for an infant. The action proceeded to judgment of foreclosure and sale, a referee was appointed and the premises were sold and the defendant became the purchaser.

The judgment roll contained sufficient and competent evidence of the actual service of the summons on the infant. The affidavit of the person who actually served the summons is unnecessary so long as there is other competent proof of such service. A third person may have actual knowledge of such service, and when he swears unequivocally and positively there is a presumption that he swears from personal knowledge and not from hearsay. The affidavit in question here was made positively and not on information and belief, and

being made by the father of the infant it is still more probable that it was founded upon personal knowledge. At any rate there was enough stated to call upon the court for a decision upon the fact of service, and the court must have found such fact as the basis for its order for the appointment of a guardian.

The judgment in the foreclosure action does not recite that jurisdiction over the infant was acquired by the voluntary appearance of the guardian *ad litem*. It recites the fact that the infant had appeared by his guardian *ad litem*, but there is no statement that jurisdiction was only obtained in that way.

The guardian had in fact appeared as the judgment roll showed, and he had put in the usual answer.

There is no inconsistency in the recital with the fact that the summons had been served as stated in the affidavit of the father, and the judgment roll is sufficiently full to show jurisdiction in the court over all the defendants in the action.

This was all the evidence offered by plaintiff upon the question as to the service of the summons on the infant defendant. We think it apparent that he wholly failed to show there was no service of the summons, and the contrary appears by the judgment roll itself.

The defendant herein then put in evidence certain papers used by him as the purchaser in the foreclosure action and forming the basis of a motion he made in that action to be relieved from his purchase on the ground that this infant defendant had never been served with the summons. As a foundation for that motion he procured the affidavit of the father in which the father swore that he was mistaken in his statement in his former affidavit when he said that the summons and copy complaint had been served on the infant, and he in this subsequent affidavit denied that the infant had been so served, and he stated the infant was at the time of the alleged service in Kansas.

The court denied the motion and held that as the record showed service it was not a case to set aside the judgment, and the purchaser was compelled to fulfill. The defendant claims that this decision is another adjudication as to the

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jurisdiction of the court made in the foreclosure action, and hence is binding on every one and cannot be attacked collaterally.

If we assume, without in any manner deciding, that the defendant is mistaken in that matter, the plaintiff is no better off. There is in the judgment roll sufficient evidence upon which to base a finding by the court therein that the service on the infant had been made and, therefore, the appointment of a guardian was proper.

If the fact of such service could be traversed in this action, the burden under these circumstances rests with the plaintiff to show that there was no service. To support the fact of service the original affidavit of the father attached to and forming part of the judgment roll is at least *prima facie* sufficient. All that the case here shows is that the father subsequently made another affidavit in which he says he was mistaken when he made the first. Treating the affidavit as if the affiant were sworn as a witness in this case, such evidence is by no means conclusive. At most it calls upon the court to now say which is the truth. The father may have been right in his first and wrong in his second affidavit. The court in this action finds as a fact that the guardian was duly appointed in the other action, which includes, if necessary to sustain the judgment, the finding that the summons was served on the infant, there being evidence to sustain such finding.

The papers on which the application to be relieved from his bid was made by defendant as purchaser are no part of the judgment roll in the foreclosure case, although if they were I see no materiality in that fact. The question would still be which affidavit is correct. But they are not, in any sense, a part of the roll and cannot be regarded as such.

The result is that the plaintiff has failed to make good his attack upon the regularity and sufficiency of the judgment in the foreclosure action, and the judgment of the trial court herein in favor of defendant should be affirmed, with costs.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. PERRIN A. STROUGH, Appellant, v.
BOARD OF COUNTY CANVASSERS OF JEFFERSON COUNTY,
Respondent.

It is the duty of the court, when passing upon an act of the legislature, to uphold and give effect to it if possible, when the legislative intent is plain.

Where a statute expresses plainly the legislative intent, and provides fully upon the subject considered, it is not invalidated by the fact that it is put in the form of an amendment to a statute which had previously been repealed; it may be upheld as an independent statute.

The provision of the Common School Act of 1856 (§ 16, chap. 179, Laws of 1856), in relation to the formation of school commissioners' districts in counties containing cities which under special acts elect superintendents of common schools, was not repealed, directly or by implication, by the act of 1864 (Chap. 555, Laws of 1864), revising and consolidating the general acts relating to public instruction.

Conceding the said provision to have been repealed, the same was re-enacted, as amended, by the act of 1883 (Chap. 414, Laws of 1883), which by its title purports to be "an act to amend" said provision.

(Argued June 19, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made April 24, 1894, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

John N. Carlisle for appellant. The board of supervisors of Jefferson county had no power to change the school commissioners' districts of Jefferson county, and the act passed by them at their session in 1892 is absolutely void and of no effect whatever. (Laws of 1856, chap. 179; Laws of 1864, chap. 555; Laws of 1883, chap. 414.) If it should be held that section 16 of chapter 179 of the Laws of 1856 was not directly repealed by chapter 555 of the Laws of 1864, it was clearly repealed by implication. (*In re N. Y. Inst.*, 121 N. Y. 234; *People v. Jaehne*, 103 id. 194; *Cromwell v. MacLean*,

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123 id. 484; *Heckmann v. Pinkney*, 81 id. 211.) Section 16 of the act of 1856 was not a special or local statute and does not come within the rules applicable to such. (*People ex rel. v. Squire*, 107 N. Y. 600.) If the court should hold that section 16 of the act of 1856 was repealed by the provisions of the act of 1864, then chapter 414 of the Laws of 1883 which purported to amend said section 16 was a nullity and conferred no power on the board of supervisors to re-district the county. (*People v. Wilmerding*, 136 N. Y. 365-373; *L. & N. R. Co. v. City of East St. Louis*, 25 N. E. Rep. 962; *State ex rel. v. Benton*, 51 N. W. Rep. 140; *Hall v. Craig*, 125 Ind. 529; *Feibleman v. State*, 98 id. 516; *McIntyre v. Marine*, 93 id. 193; *Lawson v. De Bolt*, 78 id. 563; *Brokaw v. Gibson*, 73 id. 543; *Marion Co. v. Smith*, 52 id. 420; *Blakemore v. Dolan*, 50 id. 194; *Draper v. Falley*, 33 id. 465; *Wall v. Garrison*, 11 Col. 515; *Stingle v. Nevil*, 9 Oreg. 62; *Lenhard v. Lynch*, 62 How. Pr. 56.) Where an act is wholly void, because under the law there is no power to do the act brought in question, it cannot be made valid by way of estoppel. (*Veeder v. Mudgett*, 95 N. Y. 310; *Scoville v. Thayer*, 105 U. S. 143; *Strough v. Bd. Suprs.*, 119 N. Y. 212.) The provisions of the new ballot law do not prevent a voter from voting for any candidate whom he chooses; he may, as provided in the act (§ 25), "write or paste upon his ballot the name of any person for whom he desires to vote for any office," although said person has not received a proper nomination by any political party. (*People v. Bd. Canvassers*, 133 N. Y. 493.) The essential facts being admitted in this case the remedy by a writ of peremptory mandamus was proper. (Laws of 1892, chap. 680, § 133; *People ex rel. v. Suprs.*, 51 N. Y. 401; *People ex rel. v. Suprs.*, 67 id. 109, 114-116; *People ex rel. v. Suprs.*, 68 id. 114-119.)

Watson M. Rogers for respondent. The order is not appealable. (*People ex rel. v. Ferris*, 76 N. Y. 326; *Brooke v. M. C. Co.*, 93 id. 647.) Mandamus is not proper. (High Ex. Rem. § 915; 14 Am. & Eng. Ency. of Law, 97, note;

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People ex rel. v. Stevens, 5 Hill, 615; *People ex rel. v. Bd. Suprs*, 12 Barb. 217; *People ex rel. v. Ferris*, 76 N. Y. 326; *In re Gardner*, 68 id. 467.) Mandamus does not determine title to office. (*People ex rel. Sherwood v. Bd. of Canvassers*, 129 N. Y. 373; Code Civ. Pro. §§ 1993, 1994; *People ex rel. v. Goetting*, 133 N. Y. 569.) Relator is not entitled to mandamus. (*People ex rel. v. Hayt*, 66 N. Y. 606.) The action of the board in re-districting the county was legal. (Laws of 1864, chap. 555; Laws of 1881, chap. 543, § 1; Laws of 1892, chap. 686.) Section 16 of the act of 1856 is not repealed. (*People ex rel. v. Morrison*, 78 N. Y. 84; *Whipple v. Christian*, 80 id. 523; *Smith v. People*, 47 id. 330-339; 69 id. 175; *Van Vranken v. City of Schenectady*, 31 Hun, 516-518; Laws of 1894, chap. 556.) Assuming section 16 was repealed by the act of 1864, the act of 1883 can stand as a complete independent statute; it needs no other for its support. (*Van Clief v. Van Vechten*, 55 Hun, 467; *In re Cavanaugh*, 125 N. Y. 418.)

GRAY, J. The relator by this proceeding has sought to compel a re-canvass of the votes cast at the election held in November, 1893, for school commissioner of the third school commissioner's district, in the county of Jefferson. His object is thereby to secure his election as a school commissioner; which would be accomplished, he alleges, if those votes were canvassed which were cast in the school district as its boundaries were fixed prior to 1892. In that year the board of supervisors of Jefferson county, at their annual meeting, undertook to change the boundaries of the different school commissioners' districts, and if they had the power to do so, then it is not disputed but that their act was valid. That power was, apparently, given to them by the provisions of chapter 414 of the Laws of 1883; but the relator insists that that act of the legislature was ineffectual for the purpose claimed, because it was in amendment of a section of the Common School Law, which had been repealed; either directly or by implication. The act passed in 1883 was entitled "An act

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to amend section 16 of chapter 179 of the Laws of 1856, entitled 'An act to provide for a more thorough supervision and inspection of common schools, and further to amend the statutes relating to public instruction in this state.'

It provided as follows:

"SECTION 1. Section 16 of chapter 179 of the Laws of 1856, is hereby amended so as to read as follows:

"SECTION 16. The several cities which already or which shall hereafter under special acts elect superintendents of common schools or whose board of education choose clerks doing the duty of supervision under the direction of the board of education, shall not be included in any commissioner's district created by this act or authorized to be formed by the board of supervisors; and the several boards of supervisors in counties in which such cities are joined to towns in the formation of an assembly district, may divide the county, exclusive of such cities, into school commissioners' districts as they may deem advisable, but no town shall be divided in forming such districts."

Section 16 of chapter 179 of the Laws of 1856 had provided as follows: "The several cities in this state which under special acts already elect superintendents of common schools, or whose board of education choose clerks doing the duty of supervision under the direction of the board of education shall not be included in any school commissioner's district created by this act or authorized to be formed by the board of supervisors and the several boards of supervisors in counties in which such cities are joined to towns in the formation of an assembly district, may divide the county, exclusive of such cities, into school commissioners' districts as they may deem advisable, but no town shall be divided in forming such districts."

In 1864 the legislature passed an act (Chap. 555, Laws 1864) in revision and consolidation of the general acts relating to public instruction, and section two of the second title, which treated of the election, powers and duties of school commissioners, provided as follows:

“The districts as organized under existing laws, and as recognized in the election of school commissioners at the annual election in 1863, shall continue to be held and regarded as the school commissioner districts in this state, except as the same shall be altered or modified by the legislature.”

Section 14 of title thirteen of the act repealed all repugnant or inconsistent provisions of law; but provided that nothing in the act shall be construed “to impair or in any manner affect or change any special law touching the schools or school system of any city or incorporated village of the state.” It is argued for the relator that this latter section directly repealed section 16 of the act of 1856; or, if that was not its effect, that it was repealed by implication and upon the principle that where the revising statute has covered the whole subject-matter of the former statute, it must be deemed to contain the whole law on the subject and to work the repeal of all previous legislation touching it. I should say that there was neither a direct repeal, nor a repeal by implication of the particular provision of the act of 1856 in question and the reasons given in the opinion of the General Term justices are satisfactory upon that point.

The existence of the act of 1856, which was by its terms limited in its application to particular counties of the state and concerned certain of its cities, was not inconsistent with the provisions of the general act of 1864, and, in the absence of language expressing unequivocally the intention of the legislature to repeal the special act, the courts should not incline to the view that there was an implied repeal.

But this case may rest, for its decision, upon the broad principle that chapter 414 of the Laws of 1883 was a re-enactment of the law, as contained in the act of 1856 and, as an independent statute, is unaffected by considerations of whether the provision of law, which it purports to amend, has been repealed or not by previous statutes. It is the duty of the court, when passing upon an act of the legislature, to uphold and give effect to it, where it is possible and when the legislative intent is plain, and there is no room for doubt here as

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to what the legislature intended. They enacted a law which exempted certain cities from the supervision of school commissioners and which authorized the several boards of supervisors, in counties where such cities were joined to towns in the formation of assembly districts, to divide, as they might deem advisable, their county, exclusive of such cities, into school commissioner districts.

The enactment of this law is put into the form of an amendment of a law, which was standing upon the statute books and whether that earlier law, by force of subsequent legislation, had become inoperative is wholly immaterial. The only question is, has the legislature in the enactment complained of expressed its purpose intelligibly and provided fully upon the subject. If it has, then its act is valid and must be upheld.

That is the case here. The act of 1883 contains all that is provided for in the particular section of the act of 1856 and gives full power to the boards of supervisors, with respect to the formation of school commissioners' districts. A law thus explicit and complete may not be disregarded, or invalidated, because of a possible mistake of the legislature with respect to the existence of the statute, in amendment of which the act is passed. It is an enactment of a law, in any view.

Further discussion upon this question is needless, in view of the fullness and ability with which it is treated in the opinion below and, for the reasons there and here stated, the order appealed from should be affirmed, with costs.

All concur, except O'BRIEN, J, not voting.

Order affirmed.

GEORGIE FRENCH, Appellant, v. JACOB VIX et al., Impleaded,
etc., Respondents.

H., the owner of a lot adjoining that of plaintiff's, entered into a contract with defendants by which they agreed to build a house upon said lot and "to become answerable and accountable for any damages * * * to the property * * * of any neighbor * * * during the performance of said work." Defendants entered into a contract with D., by which the latter agreed to do the necessary excavation, he assuming "all responsibility for any loss or damage to persons or property" while engaged in the work, and to save defendants harmless therefrom. In blasting rock upon said lot, while D. was engaged in the performance of his contract, plaintiff's house was injured. In an action to recover damages the evidence tended to show that the damage was caused by the negligent manner in which D. conducted the work of blasting. The trial court charged the jury that in any event the defendants were liable. *Held*, error; that defendants were not liable for negligence on the part of D.; that if there was no negligence, and the injury was the inevitable result of the blasting, no one was liable, and if defendants' contract with H. was to be treated as a contract of indemnity, it imposed no liability, as H. was not liable; that the clause referred to could not be considered as inserted for plaintiff's benefit, but even if so held, as she was not a party to the contract or in privity therewith, as to her it was without consideration and she could not enforce it.

(Argued June 6, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made February 8, 1893, which sustained defendants' exceptions, set aside a verdict in favor of plaintiff and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

William H. Arnoux for appellant. Appeal will lie to this court. The verdict for plaintiff settles all controverted questions. (*M. N. Bank v. Sirret*, 97 N. Y. 320; *O'Brien v. Jones*, 91 id. 193-196; *Wolfahret v. Beckert*, 92 id. 490, 497.) The only source in this action from which the interest of the respondents can be determined is the sealed contract which is in evidence. (*Morse v. Salisbury*, 48 N. Y. 636.) Where a

contract executed under seal contains a valuable gross moneyed consideration to be paid by one party and several distinct agreements to be performed by the other party, the consideration applies to each separate agreement without apportionment. (*Miner v. Bradley*, 22 Pick. 357.) Where, in a written instrument, a class is named as beneficiaries, or affected thereby, any individual embraced in such class stands in relation to the provisions of such instrument as if expressly named therein. (*Clinton v. H. Ins. Co.*, 45 N. Y. 454; *Simpson v. Brown*, 68 id. 360; *Coster v. Mayor, etc.*, 43 id. 411.) The contract is in its nature a contract of insurance, and, therefore, is enforceable, whether the respondent or the sub-contractor was or was not guilty of negligence. (*Lord v. Dall*, 12 Mass. 115; *Barker v. Bucklin*, 2 Den. 45; *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 id. 78; *Cooley v. H. M. Co.*, 53 id. 620.) In a crowded city, blasting contiguous to dwellings is a dangerous occupation, and whoever undertakes such work is liable to one injured thereby, whether he prosecutes it himself or employs a contractor, at least where such an accident is not the result of negligence or carelessness. (*Colton v. Onderdonk*, 69 Cal. 155; *Munro v. P. C. D., etc., Co.*, 84 id. 515; *Benner v. A. D. Co.*, 134 id. 156; *T. Co. v. Chicago*, 99 U. S. 635; *Losee v. Buchanan*, 51 N. Y. 476; *Cogswell v. N. H. R. R. Co.*, 103 id. 10.) The court below extended the doctrine as to independent contractors beyond its proper limits. The work being essentially dangerous, neither Henry nor French could relieve himself, by letting out the work, from consequences of the sub-contractor Dolan's negligence. (*Booth v. R., W. & O. R. Co.*, 140 N. Y. 267; *Bower v. Peute*, L. R. [1 Q. B. D.] 326; *Hughes v. Percival*, L. R. [8 App. Cas.] 443.)

Robert E. Deyo for respondents. The disposition of the case made by the General Term was correct. (*Booth v. R., W. & O. R. Co.*, 140 N. Y. 267; *Vrooman v. Turner*, 69 id. 280.) The court erred in refusing to allow the defendants to prove what was intended by the provision. (*Colman v. F.*

N. Bank, 53 N. Y. 388; *McMaster v. Ins. Co. of N. A.*, 55 id. 222; *Juillard v. Chaffee*, 92 id. 529, 534.)

EARL, J. This action was brought to recover damages to the plaintiff's house in the city of New York under the following circumstances: One Henry owned a rocky lot adjoining the plaintiff's house, and in May, 1891, he entered into a written contract with the respondents, whereby they agreed to build a house for him upon his lot, which contract contained the following clause: "And the parties of the second part further agree to become answerable and accountable for any damages that may be done to the property or person of any neighbor or passer-by during the performance of said work." Subsequently the respondents entered into contract with one Dolan to do the rock and earth excavation requisite for the building of Henry's house, which contract contained the following clause: "The said Dolan hereby assumes all responsibility for any loss or damage which may occur to persons or property while he or his employees are engaged in the performance of such work, and hereby agrees to save the said Jacob Vix and sons harmless from the payment of any such loss during the progress of the work." Dolan entered upon the performance of his contract, and in blasting the rock upon Henry's lot caused the damage to the plaintiff's house which is complained of in this action.

There was evidence tending to show that the damage to the plaintiff's house was caused by the negligent manner in which Dolan conducted the blasting of the rock, and there was also evidence from which the jury might have found that some damage might have been done to the plaintiff's house if the blasting had been done with the utmost care. The trial judge, in submitting the case to the jury, charged that the plaintiff was in any event entitled to a verdict, and that the only question for their consideration was the amount of damages. He reached this conclusion by holding that the respondents had, by the clause in their contract above quoted, indemnified Henry against these damages, and that as Henry was liable to

the plaintiff, to prevent circuitry of actions she could commence her action directly against them as indemnitors. The jury having rendered a verdict for the plaintiff, the judge directed the respondents' exceptions to be heard in the first instance at the General Term. There the exceptions were sustained and a new trial was granted on the ground, in substance, that it did not conclusively appear that the work which Henry contracted to have done would necessarily cause damage to the plaintiff's house; that the damage may, therefore, have resulted from the careless manner in which the work was done by Dolan, an independent contractor, which, under the case of *McCafferty v. Spuyten Duyvel R. R. Co.* (61 N. Y. 178) and other cases, imposed no liability upon Henry, and that, therefore, as he was not liable, the respondents, as his indemnitors, were not liable for these damages.

140 There was no claim upon the trial, and no contention upon the argument before us that the respondents could be made liable for damage caused by the mere carelessness of Dolan in blasting the rock, and so far as the damage to the plaintiff's house was due to mere carelessness, that may be eliminated from the case. Nor can Henry or any one working under him be made liable for damages which were the inevitable consequence of the blasting. The case of *Booth v. Rome, W. & O. T. R. R. Co.* (148 N. Y. 267) had not been decided when this case was under consideration in the courts below. There, after the fullest consideration, in an opinion carefully reviewing the authorities which leaves nothing to be said, we laid down the doctrine that one who in the reasonable use of his land blasts rocks thereon with due and proper care, is not liable for the inevitable damage caused thereby to neighboring property. We see no reason for re-considering the points decided in that case, and it must be regarded as a precise authority for the respondents unless they can be held liable for these damages by virtue of the clause in their contract above quoted; and whatever view may be taken of that clause it cannot impose liability upon them. If it be treated as a contract of indemnity it could impose no liability because

Henry not being liable there was nothing to call the indemnity into operation. The indemnitors could not be liable unless the party to be indemnified became liable. If it be claimed that this clause in the contract was intended for the benefit of the plaintiff, and that, therefore, she can enforce it, there are two answers to such a claim. It cannot be said that it was inserted for her benefit. The parties did not intend to provide indemnity against damages for which they were in no way liable. The sole purpose of the clause was the indemnity of Henry, and he alone, or some one in his right could in a proper case enforce it. But even if it could be held that the contract contained in this clause was intended for the plaintiff's benefit, she was not a party to the contract nor in privity therewith, and as to her it was wholly without consideration. As Henry could not, under any circumstances, become liable for these damages, either on the ground of careless blasting or of inevitable damage, the case of *Vrooman v. Turner* (69 N. Y. 280) is an authority for holding that the plaintiff cannot sue upon and enforce the contract.

Our conclusion, therefore, is that the order of the General Term should be affirmed, and judgment absolute rendered against the plaintiff, with costs.

All concur.

Ordered accordingly.

EDWARD F. BEDDALL, Appellant, v. THE BRITISH AND FOREIGN
MARINE INSURANCE COMPANY (Limited), Respondent.

Defendant issued an open policy of marine insurance to cover shipments of cotton from ports in the United States to ports in Europe. By the terms of the policy the adventure in each case began immediately upon the loading and continued until the safe landing of the goods at the specified port of destination. The assured was authorized to issue certificates, signed by defendant's manager, certifying that the bales of cotton mentioned therein were covered by the policy. On the margin of the policy was written a clause stating that it "covers all risks at and from the port of destination to the final destination of the cotton." A shipment of cotton was made at Norfolk, Va., the final destination of

which was Liverpool, which was insured under the policy. The cotton arrived safely at Liverpool, but on the night following its discharge, while upon the dock, it was damaged by fire. In an action upon the policy, *held*, that defendant was not liable; that the marginal clause was intended to apply in cases where the port of destination of the vessel was not the final destination of the cotton, so as to cover the shipment until it reached such final destination, but when this was reached and the cotton safely landed, the policy expired.

(Argued June 5, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 13, 1893, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Special Term.

This action was brought by plaintiff as assignee of a policy of marine insurance issued by defendant.

The facts, so far as material, are stated in the opinion.

J. Parker Kirlin and *W. G. Choate* for appellant. The plaintiff's title is complete by virtue of the assignment from all parties possibly interested, and he is entitled under section 1780 of the Code to maintain this suit. (*Darrell v. Tibbitts*, L. R. [5 Q. B. Div.] 560; *Sheridan v. Mayor, etc.*, 68 N. Y. 30; *Palmer v. P. L. Ins. Co.*, 84 id. 63; *Morris v. Tuthill*, 72 id. 575.) The defendant's contract of insurance is not contained in the policy alone, nor in the certificates alone, but in them jointly. The policy and certificates are to be taken and read together as one contract. (*Knowles v. Toone*, 96 N. Y. 534; *N. Y. D. D. Co. v. Stillman*, 30 id. 195.) The terms of defendant's insurance show an intention to cover the cotton until arrival at the warehouse in Liverpool, or at least until delivery into the actual manual custody and control of the consignees at the port of destination. That was the final destination of the cotton. The loss occurred before delivery, and, therefore, before arrival at its final destination. (*Leeds v. Ins. Co.*, 8 N. Y. 351; *Harper v. A. M. Ins. Co.*, 17 id. 194; *Benedict v. O. Ins. Co.*, 31 id. 389; *Woodruff v. C. Ins. Co.*, 2 Hilt. 122; *Clark v. Woodruff*, 83 N. Y. 518;

Westcott v. Thompson, 18 id. 363; *Cope v. Cope*, 15 Sim. 118, 120; *Youde v. Jones*, 13 M. & W. 534, 546; 2 Pars. on Cont. 500, 503, 505; *Ripley v. Yarmouth*, 56 Barb. 21; *Marvin v. Stone*, 2 Cow. 781; *Gifford v. F. Presb. Ch.*, 56 Barb. 114; *Edsell v. C. & A. R. R. Co.*, 50 N. Y. 661; *O. M. I. Co. v. Wright*, 1 Wall. 468; *K. C. Bank v. H. Ins. Co.*, 95 U. S. 673; *Noonan v. Bradley*, 9 Wall. 407; *Ward v. Whitney*, 8 N. Y. 442; *Richards v. Waring*, 39 Barb. 42; 1 Keyes, 576; *Archibald v. Thomas*, 3 Cow. 284.) Proofs of loss and interest were waived in England, but subsequently made in New York. (*K. Ins. Co. v. Pendleton*, 112 U. S. 696; *Brink v. Ins. Co.*, 80 N. Y. 108; *Thwing v. Ins. Co.*, 111 Mass. 93; *H. Ins. Co. v. B. W. Co.*, 93 U. S. 527.) Whether this is a case of double insurance and the plaintiff is entitled to recover one-half the loss, or whether he is entitled to recover the whole loss, depends upon the construction of the defendant's policy and the second condition of average in the fire policies. (*H. Ins. Co. v. B. W. Co.*, 93 U. S. 527; *L. M. Co. v. S. Ins. Co.*, 88 N. Y. 591; *N. B. & M. Ins. Co. v. L., L. & G. Ins. Co.*, L. R. [5 Ch. Div.] 583, 584; *C. Ins. Co. v. U. C. Co.*, 133 U. S. 387.)

William Allen Butler for respondent. By the terms of the policy the insurance on the 403 bales of cotton in question terminated as soon as they were safely landed at the ordinary wharves and quays, or customary loading places within the limits of the port of discharge. (1 Arnold on Mar. Ins. 389, 390; *Gatcliffe v. Bourne*, 4 Bing. [N. C.] 314; *Brown v. Carstairs*, 3 Camp. 101.) The assured put their own construction upon the terms of the policy by taking out fire insurance in Liverpool to cover the risk on the quay and by abandoning to the Liverpool fire underwriters and collecting the loss under their policy. (*Tarbell v. R. E. S. S. Co.*, 110 N. Y. 170.) The court at Special Term properly found the facts in reference to the "mill risk clause," and that it was not the intention of the parties to the policy to cover the 403

bales of cotton on the quay at Liverpool, or to cover it after it was safely landed from the steamer at Liverpool. (*Blossom v. Griffin*, 13 N. Y. 569; *In re N. Y. C. R. R. Co.*, 49 id. 414, 419; *Fabbri v. P. Ins. Co.*, 55 id. 129, 133.)

GRAY, J. The policy of insurance, upon which this action was brought, was issued to the branch house of the Liverpool firm of T. A. Wooley & Co. at Norfolk (Va.) in September 1885, as an open policy, to cover shipments of cotton from Atlantic, or Gulf, ports in the United States to ports in Europe; "Beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof on board of the said vessel, at _____ as aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at _____ as aforesaid."

Any shipments might be covered by this policy, through an authorization, contained therein, to the assured to issue certificates, signed by the company's manager in the United States and certifying that the bales of cotton mentioned therein were covered by the policy. Among the risks assumed by the insurers was that of fire. Written upon the margin of the policy was this clause: "This policy, covers also all risks at and from the port of destination to the final destination of the cotton."

In October 1886, a shipment of bales of cotton was made at Norfolk upon a steamship for Liverpool. The cotton was safely landed upon arrival at that port; but, in the night following the discharge of the shipment, a fire occurred and the cotton was badly damaged. When it was shipped at Norfolk drafts were drawn against it and accepted and, with the bills of lading, came into the hands of certain English bankers. Upon the arrival of the steamship, a firm of brokers took up the bills of lading at the request and for account of Wooley & Co.; agreeing with the holders of the acceptances to pay them at maturity and, meanwhile, to hold the property, or its proceeds, in trust to secure their payment, and further agreeing to effect insurance upon the cotton against fire, in ware-

houses or upon docks situated within six miles of the Liverpool town hall etc.

After the fire the brokers abandoned the cotton to the fire insurance companies, which paid the loss and took assignments of the interests of the assured. They, subsequently, assigned to the plaintiff all the rights they might have against this defendant and he then commenced this action; claiming that the liability of the defendant under its policy was so extended by its terms, as to cover the cotton after it was landed and while upon the dock at Liverpool. Under the general rule, in such cases of marine insurance, when the cotton was safely landed at the port of its destination, the policy certainly would have expired; but the argument is that the effect of the added clause, written upon the margin of the policy, and which made the insurance cover all risks "at and from the port of destination" etc., was to continue the risk until arrival at the warehouse in Liverpool, or until delivery into the manual custody of the consignees.

I do not think it to be necessary to have recourse to evidence to show what was the purpose of, or the understanding as to the insertion of the marginal clause in question. If this policy had been issued upon the occasion of, and for this particular shipment, the appellant's argument that the risk extended beyond the landing of the goods would have some force. But this was an open policy, issued some time before, and intended to cover future shipments of cotton, as they might be certified under the policy by the assured. The general form of the policy was such as to make it apply to risks while the goods were in course of shipment from ports to ports; but as it was plainly in the contemplation of the parties that the port of destination of the shipment might not always be the final destination of the cotton itself, there was added to the policy a clause, under which the risk, in such a case, would endure until the cotton had reached its final destination beyond the port for which the vessel was destined. The language may be open to criticism, for failing to express as clearly as it was possible the precise obligation of the

insurer ; but, however that may be, it is certain that the protection of the policy is not suspended while the goods shipped from ports in this country are in transit to points beyond the port of destination. The use of the word "at," in connection with "the port of destination," in the marginal clause, may well have been to cover the goods while upon the dock and intermediate their landing from the ship and their forwarding from the particular port to their final destination. I do not say that its use was legally necessary for that purpose ; but it may be said to have prevented any doubt upon the subject of the duration and extent of the risk.

In the construction of this contract of insurance, the extent of the obligation of the insurer is to be ascertained by considering, in connection with the language of the policy, the situation of the parties at the time and the nature of the transactions to which it might become applicable. We are afforded certain knowledge as to what was the final destination of the bales of cotton, by reading the certificates, which were issued by the assured in order to bring them within the protection of the policy, and the bills of lading. In each, the shipment is defined to be as from Norfolk, Va. to Liverpool, England. That the insurer is not supposed to have knowledge of the contents of the bills of lading, does not affect the question of what was the destination of the goods insured. They do show, as do the insurance certificates, as a matter of fact, that destination to have been the port of Liverpool and not some further point, which would call into operation the provision of the marginal clause in question. This contract, as all other contracts, should receive a fair and reasonable interpretation. The addition of the clause in writing upon the margin introduced no ambiguity, nor contradiction, into the insurer's contract and called for no outside explanation of its object. That is clear from the language and the nature of the policy and upon a consideration of the situation of the parties to it at the time of its making.

I think that there was no error in holding that a practical construction was placed upon the contract of insurance by the

assured, in effecting through their brokers further insurance against fire with the Liverpool companies, upon the arrival of the ship at that port. It need not be considered a controlling fact; but it was a circumstance which illustrated an understanding of the extent of the risk and serves to confirm the view that the policy by its terms expired, as to the shipment of cotton in question, upon its being safely landed.

It is quite unnecessary to discuss the question of whether there was any actual delivery to the consignees, by reason of the official relations to the consignment of the master porter; an officer appointed under act of Parliament by the Mersey dock board and invested with certain duties connected with the supervision, the weighing and other acts specified to be done with respect to goods landed on any quay. The finding that the cotton was safely landed at the port, before the fire occurred, was not excepted to and is conceded and that was the fact which caused the cessation of the risk.

The opinion at the General Term is full and satisfactory and we might well have rested our affirmance upon it.

The judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
MICHAEL CADY, Appellant.

One committed to prison does not cease to be a prisoner because of the fact that he is not strictly confined, and is permitted by the officials in charge to go in and out of the prison. Nor is his position as prisoner affected by the fact that his commitment was illegal.

The domicile or home requisite as a qualification for voting means a residence which the voter voluntarily chooses and has a right to take as such, and which he is at liberty to leave.

The New York city prison, "The Tombs," is not a place of residence save for the keeper and his family, and a person cannot, under the guise of a commitment, or even without any commitment, go there as a prisoner and gain a residence.

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Statement of case.

On the trial of an indictment for illegal registration these facts appeared :

The defendant, at the time of his registration, was confined in the Tombs as a vagrant under a commitment for six months issued by one of the commissioners of charities and correction ; he had been in that prison most of the time for about seven years under similar commitments. All of these commitments were issued upon his own application. When one commitment ran out he would immediately or soon after make application for another. He was employed in doing light work and errands, and while thus employed was permitted to go in and out of the prison. Defendant testified that he lived in the Tombs, and had for seven years; that he had no other home, and intended to make the prison his home as long as he could not get any other home. He registered in the election district which included the said prison. *Held*, that the defendant was at all times when at the Tombs a prisoner, and so he was not a resident in the district, and was properly found guilty of the offense charged.

(Argued June 20, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 21, 1894, which affirmed a judgment of the Court of Oyer and Terminer of the city and county of New York, entered upon a verdict convicting the defendant of the crime of illegal registration.

The facts, so far as material, are stated in the opinion.

James J. Walsh for appellant. The uncontradicted testimony shows that the appellant acquired a residence at the city prison in the election district in which he registered. (2 Kent's Comm. [2d ed.] 431; *Crawford v. Wilson*, 4 Barb. 504, 520; *People v. Platt*, 117 N. Y. 159.) The right of suffrage is a sacred right, and it was plainly the intention of the framers of the Constitution to extend that right to all persons except those excluded therefrom by its strict terms. It was not intended to exclude the poor or unfortunate. (Const. N. Y. art. 2, §§ 1, 2, 3.) In any event, whether or not the appellant herein acquired a residence at the city prison under all the facts, was a question for the jury to decide, and the learned court below erred in refusing to submit the evidence to

the jury for them to determine whether the appellant acquired a residence under all the facts, and erred in instructing the jury that "there was no issue. He could not make it his home, whether he intended to or not." (Const. N. Y. art. 2, § 3.) The commitment was void and a nullity, and though it did operate to confine the appellant physically, it did not operate to confine him to a prison within the meaning of the Constitution. (Laws of 1882, chap. 410, § 1464.) There was legal evidence to show that the appellant was at the Tombs prison without commitment for about two years. And the learned court erred in refusing to charge the jury that the defendant could acquire by intention and location a residence at the Tombs provided he was not committed. And the learned court also erred in refusing to charge the jury that if he acquired a legal residence at the city prison, the fact of his commitment after acquiring such residence would not lose him that residence. (*People v. Foster*, 50 N. Y. 598; *In re Ward*, 20 Abb. [N. C.] 187.)

John D. Lindsay for respondent. The defendant was confined in a public prison, within the meaning of the Constitution, from the time of his original commitment thereto till the day of the alleged crime, and was incapable of gaining a residence there for the purpose of voting. (Laws of 1882, chap. 410, §§ 1493, 1495, 1499; Penal Code, § 92; Code Crim. Pro. §§ 193, 209, 212, 214, 301, 477, 852, 858; *Wheeler v. State*, 39 Kan. 163.) The appellant's own testimony shows that he never acquired, and could not under the law, acquire, a residence in the election district in which the city prison is situated under the condition attending his admission there. (*Silvey v. Lindsay*, 107 N. Y. 55; 13 N. E. Rep. 441; *Allentown Election*, Brightley's Election Cases, 468; *Cadwallader v. Howell*, 18 N. J. L. 138; *Cooper v. Galbraith*, 3 Wash. C. C. 546; *U. S. v. The Penelope*, 2 Pet. Ad. 450; *White v. Brown*, 1 Wall., Jr., 217; *State v. Daniels*, 44 N. H. 383; *Risewick v. Davis*, 10 Md. 82; *Granby v. Amherst*, 7 Mass. 1; *Jennison v. Hapgood*, 10 Pick. 77; *Chase v.*

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Miller, 41 Penn. St. 420; 5 *Wright*, 403; *Guier v. O'Daniel*, 1 Binn. 352, note; *Moore v. Darrall*, 4 Hagg. Eccl. 346; *Tanner v. King*, 11 La. 175; 5 *Metc.* 587; *Somerville v. Somerville*, 5 Vesey, Jr., 750; *Casey's Case*, 1 Ash. 126; *In re Ward*, 29 Abb. [N. C.] 187; *Dale v. Irwin*, 78 Ill. 170, 182; *Granby v. Amherst*, 7 Mass. 1; *Opinion of Judges, etc.*, 5 *Metc.* 587; *Vanderpoel v. O'Hanlon*, 53 Iowa, 246; *Fry's Election Case*, 71 Penn. St. 302; *Lower Oxford Contested Election*, 11 Phil. 641; *Putnam v. Johnson*, 10 Mass. 488.) The appellant's abode in the city prison lacked the elements of choice and volition, without which he could not in law claim it as his residence. (*Town of Freeport v. Bd. Suprs.*, 41 Ill. 495, 500, 501; *Payne v. Town of Dunham*, 29 Ill. 125; *Uptown v. Northbridge*, 15 Mass. 547; *Reading v. Westport*, 19 Conn. 561; *Amherst v. Hollis*, 9 N. H. 107; *Winchenden v. Hatfield*, 4 Mass. 123; *Andover v. Canton*, 13 id. 547.) The constitutional provision under consideration was intended to prevent the allowance of any claim or right to vote in an election district resulting from a change of abode such as existed in the present case. (*Silvey v. Lindsay*, 107 N. Y. 55; *Matter of Ward*, 29 Abb. [N. C.] 187.) The same rules of law, and the same grounds of public policy, require the application of these principles to persons confined in public prisons. (*Silvey v. Lindsay*, 107 N. Y. 55.) The technical legality of the act of commitment or of the manner of commitment itself is wholly immaterial. (*People v. Washburn*, 10 Johns. 160; *People v. Cook*, 8 N. Y. 67, 89, 90; *Laws of 1842*, 134, § 1; 2 R. S. 681, § 1; *State v. Hascall*, 6 N. H. 352; 2 C. & H. 1101; *Van Steenberg v. Kortz*, 10 Johns. 167.) There is no evidence upon which the contention can be made that the appellant was ever a voluntary resident of the city prison, and was, therefore, able to adopt it as his home. (*In re Registry Lists*, 10 Phil. 213.) The record discloses no proper ground upon which the appellant can justly ask this court to interfere with the conviction. (Code Crim. Pro. §§ 542, 684.)

EARL, J. The defendant was convicted for illegal registration in the fall of 1893, in an election district in the city of New York of which he was not at the time a resident. He claims he was a resident of the election district, and whether he was or not is the question to be determined upon the present appeal. At and before the time of his registration he was in the Tombs city prison under a commitment by a magistrate, of which the following is a copy :

"The Warden and Keeper of the City Prison of the City of New York will receive and safely keep in his custody, for examination by the Commissioners of Public Charities and Correction, the body of Michael Cady, Charged with Destitution on Confession.

"1 District Police Court, New York, Aug. 14, 1893.

"C. W. MEADE,

"Police Justice.

"Committed to W. H. Six Months. EDWARD C. SHEEHY."

Sheehy was one of the commissioners of charities, and this commitment is supposed to have been made under section 412 of the New York Consolidation Act of 1882, which reads as follows :

"It shall be lawful for the Board of Charities and Correction to commit to any of the institutions under their charge other than penal for a period not exceeding six months, any person or persons committed to their charge by any police magistrate of the City of New York, and such vagrants as ask for commitment."

He had been in the Tombs prison for about seven years, most of the time under similar commitments. He was always committed upon his own application, and when a commitment ran out he would immediately or after the lapse of some time make application for another, and thus there might be an interval of time, probably overlooked, between two successive commitments. He was during all the time supported at the public expense in the prison, and was there frequently employed to carry messages and do some slight work for the

warden of the prison, and while thus employed was permitted to go in and out of the prison. He was received into the prison and detained there solely by virtue of the commitments and could be formally discharged from the prison, according to the practice in vogue there, only by the authority of one of the commissioners of charities. As a witness in his own behalf he testified that he lived in the Tombs prison in the election district where he registered; that he had lived there nearly seven years; that he had no other home and never had had any other home since he went to the prison; that during that time he did not intend to have any other home; that he did intend to make the prison his home "as long as he could not do any better—could not get any other home," and that he had such intention during the whole time; that he was committed upon his own application; that he had no home, no work and made application to be committed to get a home and work.

Now, under these circumstances did he gain a residence in the Tombs? The Constitution provides in article 2, section 3, that "no person shall be deemed to have gained or lost a residence by reason of his presence or absence while kept at any almshouse or other asylum at public expense, nor while confined in any public prison."

It does not appear where his residence was before his commitment to the prison. He was at all times in a real sense a prisoner at the Tombs. He was not there as a laborer working for wages or even working for his own support, or as a member of the warden's family. He was maintained at the public expense and was confined like others of his class. One committed to prison does not cease to be a prisoner because he is not strictly confined and is permitted by the prison officials to go in and out of the prison upon errands. Nor does it matter for the purpose now in hand that the commitment was irregular or even illegal. One may even be taken by violence and thrust into prison and confined there, or he may be detained there by his consent without any commitment, and yet he could not by such detention in prison gain a resi-

dence there for the purpose of voting. Before going to the prison, the defendant had a residence somewhere, and before he could change that it was requisite that he should go to the Tombs intending to make that his home and domicile, either permanently or for some unlimited time without any intention of returning or reverting to his former residence, and in fact intending thereby to change his former residence to the Tombs. The domicile or home requisite as a qualification for voting purposes means a residence which the voter voluntarily chooses and has a right to take as such, and which he is at liberty to leave, as interest or caprice may dictate, but without any present intention to change it. It is preposterous to suppose that the defendant had within these rules and the law laid down in *Silvey v. Lindsay* (107 N. Y. 55) and many other cases found in the learned brief submitted in behalf of the People, made the Tombs his residence. He was a single man. The Tombs is not a place of residence. It is not constructed or maintained for that purpose. It is a place of confinement for all except the keeper and his family, and a person cannot under the guise of a commitment, or even without any commitment, go there as a prisoner, having a right to be there only as a prisoner, and gain a residence there.

We think upon all the evidence it is clear and without reasonable dispute that the defendant was not a resident in the district in which he registered; and are of opinion that no error was committed upon the trial to his prejudice.

The conviction should be affirmed.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
MORRIS SPIEGEL, Appellant.

An indictment charging the presentation to a fire insurance company of a false and fraudulent claim for alleged loss by fire of property insured in several companies, alleged the service of proofs of loss, which were set forth; that the total loss was not the sum asserted in the proofs presented; that the particular claim made against the company complainant was not justly due, and that both claims were false and fraudulent to the knowledge of the defendant, and were feloniously presented in violation of the statute. *Held*, that this was a sufficient statement of the facts.

Upon trial of the indictment defendant's books of account, which had been seized and brought into court, were introduced in evidence. No objection was made on the part of defendant on the ground that the books were produced against his will. *Held*, that there was no compulsion within the meaning of the constitutional provision declaring that no person in a criminal action shall be compelled to testify against himself, and that in the absence of such an objection the books were competent evidence, and this, although their production and use could be said to have been proof of defendant's own confession or admission, instead of a part of the *res gestæ* of the crime.

Reported below, 75 Hun, 161.

(Argued June 15, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 12, 1894, which affirmed a judgment of the Court of Oyer and Terminer of the city and county of New York, entered upon a verdict, convicting defendant of the crime of presenting false proofs of loss in support of a claim upon a policy of insurance in violation of section 579 of the Penal Code.

The indictment contained two counts. The first alleged the issuing of a policy to the defendant by the Insurance Company of North America; that this policy and other policies issued by the companies representing insurance to the amount of \$35,000 were in full force and effect at the time of the commission of the crime; that a fire occurred in the defendant's premises on the 16th of December, 1892, by which certain loss and damage were occasioned.

The indictment then averred that the defendant, "afterwards, to wit, on the fifth day of January, in the year of our Lord one thousand eight hundred and ninety-two, at the city and county aforesaid, with force and arms, fraudulently and knowingly did feloniously present and cause to be presented to the said the Insurance Company of North America a certain false and fraudulent claim for the payment of a loss upon the said contract of insurance so issued as aforesaid by the said the Insurance Company of North America, wherein and whereby it was claimed, set forth and alleged by the said Morris Spiegel that a loss had been sustained by him the said Morris Spiegel by reason of the said fire, and the destruction and damage occasioned thereby to the goods, chattels and merchandise contained in the said building at the time of the said fire, and so insured as aforesaid to the extent of seventy thousand two hundred and twenty-one dollars and seventy-nine cents, and that the said the Insurance Company of North America was then justly indebted to him the said Morris Spiegel by reason of the loss, damage and contract of insurance in the sum of seven thousand dollars, which said claim was then and there false and fraudulent in this, to wit, that a loss had not been sustained by the said Morris Spiegel by reason of the said fire and the destruction and damage occasioned thereby to goods, chattels and merchandise contained in the said building at the time of said fire, and so insured as aforesaid to the extent of seventy thousand two hundred and twenty-one dollars and seventy-nine cents, and the said the Insurance Company of North America was not justly indebted to the said Morris Spiegel by reason of the said loss, damage and contract of insurance in the sum of seven thousand dollars; all of which he the said Morris Spiegel then and there well knew."

The second count only differed from the first in that it contained no reference to the additional insurance.

Further facts appear in the opinion.

Charles Daniels for appellant. The indictment was insufficient to present a violation of the statute under which it was

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found. (*U. S. v. Cruikshank*, 92 U. S. 542, 578; *U. S. v. Britton*, 107 id. 655; *U. S. v. Hess*, 124 id. 483.) The court erred in rejecting the juror Benno Rothgeisser. (Code Civ. Pro. §§ 378, 1079; Code Crim. Pro. §§ 377, 384, 387; *People v. McQaade*, 110 N. Y. 284.) The warrants were issued, as their recitals state, to obtain the private books of the defendant without any pretense of legal authority, and in violation of the security afforded him by section 6, article 1 of the Constitution of the state, and section 11 of the state bill of rights. (2 R. S. [6th ed.] 376.) The judge presiding at the trial permitted the public prosecutor to give incompetent and inadmissible evidence over the objection and exception of the defendant's counsel. (*Silberstein v. Houston*, 117 N. Y. 293; *Tozer v. N. Y. C. R. R. Co.*, 105 id. 659; *Boyd v. U. S.*, 116 U. S. 616; *Counselman v. Hitchcock*, 142 id. 547; *Lees v. U. S.*, 150 id. 476.) The seizure of the book containing the stock account of 1886, and its production in evidence, was compulsory and violated the protection afforded to the defendant by the Constitution of the state. (*Boyd v. U. S.*, 116 U. S. 616; *Cancemi v. People*, 18 N. Y. 128; *Mauer v. People*, 43 id. 1; *People v. Bork*, 96 id. 188, 196; *People v. Campbell*, 4 Park. Crim. Cas. 386; *Ex parte Bain*, 121 U. S. 1.) The judge's charge was erroneous. (*Chapman v. McCormack*, 80 N. Y. 479; Code Crim. Pro. § 419; *Sherwood v. M. Ins. Co.*, 5 Hun, 115; *McGrath v. M. Ins. Co.*, 6 N. Y. St. Repr. 370; *Dolan v. D., etc., Co.*, 71 N. Y. 285.) The court erroneously excluded evidence of the second appraisal. (*Halsey v. Sinsebaugh*, 15 N. Y. 488; *Russell v. H. R. R. Co.*, 17 id. 134, 140; *Howard v. McDonough*, 77 id. 592.) The motion to strike out the evidence of Vincenot should have been granted. (*Denise v. Denise*, 110 N. Y. 562; *Warren Co. v. Holbrook*, 118 id. 587; *Hutchins v. Hutchins*, 98 id. 57.)

Abram Kling for the appellant. The facts alleged in the indictment are not sufficient to constitute a crime. (Penal Code, § 579.) The prosecution failed to prove at the trial that the defendant's loss was less than the amount of his

insurance. (Code Crim. Pro. § 275; *People v. Albrow*, 140 N. Y. 130; *People v. Stark*, 136 id. 538; *Sherwin v. People*, 130 id. 355.) There was a fatal variance between the crime charged in the indictment and the crime regarding which evidence was given. (Penal Code, § 579.) The burden of proof that the loss sustained by the defendant was less than the amount of his insurance rested on the prosecution and in this essential proof they utterly failed. (*People v. Dumar*, 106 N. Y. 511; *Lambert v. People*, 76 id. 220; *Wood v. People*, 53 id. 511; *Southwick v. N. Bank*, 84 id. 420.) All the ingredients of the offense must be stated or the indictment is defective. (*U. S. v. Cook*, 17 Wall. 174; *U. S. v. Simmons*, 96 U. S. 360; *U. S. v. Reed*, 1 Low, 232; *U. S. v. Cruikshank*, 92 U. S. 542, 578; *U. S. v. Clark*, 1 Gall. 497; *U. S. v. Staats*, 8 How. 41; *U. S. v. Howard*, 1 Saw. 507; *U. S. v. Britton*, 107 U. S. 655; *U. S. v. Reese*, 92 id. 225.) The features of the statute must be enumerated with rigid particularity; nothing can be taken by inference or intendment. (6 Dana, 291; *Howard Case*, 1 Saw. 507; 1 Hale, 517, 526, 535; *R. v. Ryan*, 7 C. & P. 854; *U. S. v. Lancaster*, 2 McL. 431; *U. S. v. Andrews*, 2 Paine, 551; *U. S. v. Pond*, 2 Curt. C. C. 265; *State v. Gurney*, 37 Maine, 149; *State v. Fust*, 35 N. H. 438; *Com. v. Fearn*, 125 Mass. 387; *Phelps v. People*, 72 N. Y. 334; *People v. Allen*, 5 Den. 76; Whart. Crim. Prac. §§ 220, 223, 225, 229, 235.)

John D. Lindsay for respondent. The Court of Appeals will not, save in a capital case, review alleged error where no exception was taken at the trial. (*People v. Brooks*, 131 N. Y. 321; *People v. Most*, 128 id. 113; *People v. Donovan*, 101 id. 63; *People v. Guidici*, 100 id. 503; *People v. Hovey*, 92 id. 554.) Technical errors not affecting the substantial rights of the defendant present no ground for reversal. (*People v. Brooks*, 131 N. Y. 321; *People v. Fanning*, 131 id. 673; *People v. Wayman*, 128 id. 585; *People v. Gillman*, 125 id. 375; *People v. Spinwall*, 115 id. 525; *People v.*

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Bliven, 112 id. 79, 92; *People v. Johnson*, 110 id. 341; *People v. Gonzales*, 35 id. 49, 60; Code Crim. Pro. §§ 275, 284; *People v. Dimick*, 107 N. Y. 13, 35; *People v. Jackson*, 111 id. 362, 369; *People v. Dumar*, 106 id. 507; *People v. Willett*, 102 id. 251; *People v. Moses*, 99 id. 662; *People v. Conroy*, 97 id. 62.) There was no error in any of the rulings of the trial court upon the admission or exclusion of evidence. (*Benjamin v. Ellinger*, 80 Ky. 472; *Kelly v. People*, 55 N. Y. 565; *People v. Chacon*, 102 id. 671.) There was no variance between the indictment and the proof. (Penal Code, § 579.) The challenge of the People to the juror Benno Rothgeisser was properly sustained. (Code Crim. Pro. § 375; *People v. McQuade*, 110 N. Y. 432.) There was no error in the charge. (*People v. Fluck*, 125 N. Y. 334; *People v. Fanning*, 131 id. 663; *People v. Dimick*, 107 id. 13.) The use by the prosecution upon the trial of the books alleged to have been taken from the defendant's possession under a search warrant presents no question for the consideration of this court. (*Pierson v. People*, 79 N. Y. 424; *People v. Tice*, 131 id. 651; *Boyd v. U. S.*, 116 U. S. 616; Code Crim. Proc. § 813; *State v. Graham*, 74 N. C. 646; *Johnson v. Comm.*, 115 Penn. St. 369.)

FINCH, J. The defendant has been convicted of presenting to an insurance company a false and fraudulent claim for an alleged loss by fire. The indictment sufficiently charges the offense and is not open to the criticism which assailed it on the argument. The pleading alleges that the total loss was not the sum asserted in the proofs presented, and that the particular claim against the company was not justly due, and that both claims were false and fraudulent to the knowledge of the defendant and were feloniously presented and in violation of the statute. The total amount of the loss dictated the amounts chargeable in due proportion to each of the insuring companies; and the indictment avers, not only the falsity of the total loss claimed, but specifically of the particular claim founded thereon against the company making the complaint.

That was a sufficient statement of the facts, and fairly apprised the accused of the crime with which he was charged. Narrow and technical objections to the form of an indictment have had their day, and it is our duty not to drift back into the old uncertainty.

What the indictment charged the proof tended to establish. That there was any failure of such proof rests mainly upon a contention, not borne out by the facts, that no specific claim for any specific amount was made because of an alleged modifying provision contained in the proofs of loss presented to the company. The claim distinctly made was for a total loss to the full extent of the sum insured, and the aggregate of damages claimed was more than double the amount of the entire insurance. There was a statement that in estimating the total loss no credit had been given for a possible salvage upon articles merely damaged, but it was also alleged as a reason for the omission that these in their damaged state had no commercial value to the insured, although subject to an appraisal. Undoubtedly this meant that the total loss claimed might, by the action of the insurer under the policy, suffer a reduction by the amount of some value found to remain in the injured articles; but the false claim of loss remained and was made so large that its possible reduction by a salvage which the insured did not admit would still leave the company liable for the full amount of its insurance, or at all events for more than it ought to pay. And this very damage, left open to a possible reduction, was shown to be itself the result of fraud rather than fire, and of the agency of the insured himself. The claim presented did not cease to be vicious because left open to the reduction of an appraisal, but may have been found by the jury to have been framed to work its intended result in spite of such reduction, which the policy itself would compel, and which it was no great virtue to anticipate. The question of fraudulent intent was thus one for the jury upon all the facts developed.

A further argument is made, founded upon the evidence furnished by the books of the insured, and rests upon the con-

tention that, by their production or proof of their contents, the accused was compelled to give evidence against himself in a criminal action. The constitutional provision is invoked that no person shall be compelled in any criminal case to be a witness against himself (Art. 1, § 6), and reference is made to the authority of *Boyd v. United States* (116 U. S. 616). The General Term make two answers: that no objection or exception anywhere in the case presents the question; and that a party may waive the benefit even of a constitutional provision, at least, where it does not affect matters in which the public have an interest apart from and outside of the personal right of the individual. These answers combined show an utter absence of the compulsion which the constitutional provision forbids. We are not concerned with the question whether the seizure of the defendant's books was by itself lawful or unlawful, but merely with the use made of them on the trial. There was no compulsion in that use, because it was not objected to upon that ground. The defendant might have objected; he might have resisted; he could possibly have prevented the use made of the books, but instead, he either silently permitted the evidence to be given, or at the most only questioned its general relevancy or competency. It was both relevant and competent, at least until he so objected as to make its admission compulsory and against his will. And this is true even if the production and use of the books can be said to have been his own confession or admission instead of a part of the very *res gestæ* of the crime.

It is further contended that the court erred in the charge to the jury in respect to the force and effect of the evidence given outside of that which came from Blais, who confessed himself to be both a thief and a liar, and so was unreliable as a witness. It is not necessary to add anything to the answer of the General Term beyond an expression of our concurrence. That answer shows in a very satisfactory manner that the trial judge did not invade the province of the jury, and in substance only ruled that with the testimony of Blais eliminated

enough evidence remained to be submitted to their judgment, and upon which, if it satisfied them beyond a reasonable doubt, they might rest their verdict. The opinion points out how fairly and fully the questions of fact were submitted through the whole body of the charge, and that the one sentence criticized itself left the case to the judgment of the jury, both as to the disregard of Blais' testimony and as to the effect of the remaining proof.

I have read through the very voluminous record of the trial. There is much conflict of evidence; there is room for divergent inferences, and there is basis for argument on both sides; but the facts were for the jury, and their conclusion must prevail. There is no error of law which requires a new trial.

The judgment must be affirmed.

All concur, except ANDREWS, Ch. J., not sitting.

Judgment affirmed.

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In the Matter of the Appraisal under the Collateral Inheritance Tax Act of the Property of DANIEL B. FAYERWEATHER, Deceased

Under the provision of the Collateral Inheritance Tax Act of 1887 (§ 5, chap. 713, Laws of 1887), providing that the penalty of ten per cent imposed by the act (§ 4) in case of non-payment of the taxes prescribed within eighteen months after the death of a decedent shall not be charged, when, for reasons specified, the decedent's estate could not be settled within the eighteen months, but only six per cent from the expiration of the eighteen months, the executors of the estate of a decedent who died prior to the passage of the Repealing Act of 1892 (Chap. 399, Laws of 1892) had the right to ask that the interest to be charged for delayed payment, excused under said provisions, should be six per cent, beginning at the expiration of the eighteen months.

Such a case, therefore, comes within the provision of said Repealing Act, saving from the repealing clause any "right accruing, accrued or acquired prior to May 1, 1892, under or by virtue of any law so repealed."

Accordingly *held*, where a decedent died in November, 1890, and the probate of his will was contested, but the same was admitted to probate in March, 1891, and the executors of the will failed to pay a portion of

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the taxes imposed by the act of 1887 within eighteen months of the death, that the ten per cent penalty could not be imposed, and six per cent interest could only be charged from and after the expiration of the eighteen months.

(Argued June 18, 1894; decided October 9, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 8, 1894, which affirmed an order of the surrogate of New York county directing interest at the rate of six per cent per annum to be charged upon a portion of the collateral inheritance tax fixed upon the estate of Daniel B. Fayerweather, deceased.

The facts, so far as material, are stated in the opinion.

Emmet R. Olcott for appellant. The penalty of ten per cent for non-payment of tax within eighteen months after its accrual having been remitted, interest at the rate of six per cent per annum from the date of such accrual was properly chargeable. (Laws of 1892, chap. 399, §§ 4, 26; Laws of 1887, chap. 713, § 4; *In re Vassar*, 127 N. Y. 8; *People v. Roper*, 35 id. 638; *O. Bank v. Freeze*, 18 Maine, 109; *Butler v. Pennsylvania*, 15 How. [U. S.] 418; *Butler v. Palmer*, 1 Hill, 324; *Hartung v. People*, 22 N. Y. 102; *Ex parte McCardle*, 7 Wall. 506; *State v. Slevin*, 16 Mo. App. 541.)

Wm. H. Arnoux and *Wm. C. Wallace* for respondent. The courts will not give a retroactive effect to any statute unless it is clearly and unmistakably the intention of the legislature that it shall have such effect. (*Conley v. Palmer*, 2 N. Y. 182; *Sandford v. Bennett*, 24 id. 20; *Stone v. Flower*, 47 id. 566; *Parmenter v. State*, 135 id. 143; *Dwarris on Stat.* 680; *Sedgwick on Stat. Law*, 180; *Smith's Com.* 291; *Brown's Leg. Max.* 14; *Moore v. Durden*, 2 Exch. 21; *Dash v. Van Kleeck*, 7 Johns. 447; *Butler v. Palmer*, 1 Hill, 324; *Wood v. Oakley*, 11 Paige, 400; *Bull v. Ketcham*, 2 Den. 188; *People v. Supervisors*, 10 Wend. 383; *Van Rensselaer v. Livingston*, 12 id. 490.) All tax laws must be construed strictly and they cannot be enlarged by implication beyond the exact letter of the stat-

ute, and they will never be given a retroactive effect. (*U. S. v. Wiggleworth*, 2 Story, 269; *U. S. v. Watts*, 1 Bond, 580; *Partington v. Atty.-Gen.*, L. R. [4 H. L.] 100; *Warrington v. Furber*, 9 East, 242; *Greene v. Holway*, 101 Mass. 243; *Riggs v. Palmer*, 115 N. Y. 506.) This act is not retroactive, and section 24 of the statute of 1892 clearly repeals any retroactive construction of said act. (*Sherrill v. Christ Church*, 121 N. Y. 701; *In re Miller*, 110 id. 216; *People v. O'Brien*, 111 id. 1; *Quinlan v. Welch*, 141 id. 158.)

PECKHAM, J. The executors of the will of the above decedent made certain payments on account of the collateral inheritance tax, within the period of eighteen months subsequent to his decease, and in regard to the balance due they applied some time after the eighteen months had expired and under the fifth section of the Tax Act to have the penalty of ten per cent interest thereon remitted. The comptroller of the city of New York appeals from the order made by the surrogate of New York county granting that application. The order was affirmed by the General Term of the Supreme Court of the first department.

The decedent died on the 15th day of November, 1890, leaving a large estate. A contest arose over the probate of the will. It was finally decided in favor of the proponents, and the will was admitted to probate by the surrogate of New York on the 24th of March, 1891.

The application of the executors to the surrogate for a remission of the penalty imposed by law for the non-payment of the whole of the tax within eighteen months of the date of the death of the decedent, resulted favorably to the executors, and the surrogate adjudged that by reason of litigation and other unavoidable causes the amount of the tax had not been determined, and he, therefore, granted the application and remitted the penalty, and then decreed that the interest to be charged on the balance of the tax then imposed should be at the rate of six per cent from the 15th of May, 1892 (eighteen months subsequent to the death of the decedent), and the

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application of the comptroller for an order charging interest on that amount at the rate of six per cent from the death of the testator (Nov. 15, 1890), as provided by chap. 399 of the Laws of 1892, was denied. The question, therefore, is simply whether interest on the amount of the tax still due shall be charged from the date of the death of the decedent or from a date eighteen months subsequent thereto.

If the saving clause in the 24th section of the act, chap. 399, of the Laws of 1892, cover and apply to this case, then the order is right. If it do not, then the further question would arise whether in any event the act of 1892 applied to the estate of any individual dying before its passage.

Under the act of 1887 (Chap. 713), which was in force at the time of the death of the decedent, the taxes imposed by the act were by the fourth section thereof made due and payable at the death of the decedent, and if they were paid within eighteen months thereafter no interest was to be charged or collected thereon, but if not so paid, interest at the rate of ten per cent per annum was to be charged and collected from the time the tax accrued. By the fifth section of the act it was provided that the penalty of ten per cent imposed by the fourth section should not be charged where in cases by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, the estate of a decedent could not be settled at the end of the eighteen months from the death of the decedent, and in such cases only six per cent per annum should be charged from the expiration of the eighteen months until the cause of delay should be removed. At the time, therefore, when the tax upon this estate accrued or became due, viz., upon the death of the decedent, the law gave the executors of his will eighteen months in which to pay the tax without the addition of any interest whatever, and ten per cent interest from the time this tax accrued was imposed as a penalty for non-payment unless it was excused under the provisions of section 5 above quoted, and in that case interest only at the rate of six per cent from the expiration of the eighteen months, until the cause of delay was removed, was

imposed. When the decedent died his estate at once became liable for the payment of this tax of five per cent, and provision was made for the payment of a penalty and for an exemption from such penalty, under circumstances provided for in the statute. So far as the imposition of the tax was concerned, the legislature imposed a liability; a liability was also imposed in the nature of a penalty for the failure to pay the tax within a certain time, and a privilege or right was granted to avoid the penalty under the circumstances set forth in the act, and when the penalty was not charged, the interest was then to be six per cent from the expiration of eighteen months subsequent to the death of the decedent.

While the law was in this condition the legislature on the first day of May, 1892, passed the act, chapter 399 of the laws of that year. The statute repealed the prior acts upon the subject of taxation of collateral inheritances and itself made full provision therefor. It altered the fifth section of the act of 1887, above alluded to, by providing that if the penalty of ten per cent interest on overdue taxes was not charged, then interest at the rate of six per cent per annum should be charged from the date of the decedent's death. The reasons for not charging the penalty of ten per cent were left the same in the new as in the old statute.

Section 24 of the new or repealing act contained a saving clause providing that the repealing clause should "not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to May 1, 1892, under or by virtue of any law so repealed." It will be seen that the repealing act was passed a few days before the expiration of eighteen months subsequent to the death of the decedent. The appellant's counsel claims that when the act was passed there remained a period of time within which the tax could have been paid without the liability to pay any penalty, and that before such time had expired, and consequently before the possible right to charge the penalty had accrued, the law was changed so that when the right did accrue, unless it were remitted, the law provided

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for the payment of interest from the death of the decedent, instead of from eighteen months thereafter. I think this is an erroneous view of the case.

When the decedent died the law of 1887 in its entirety applied, and, under its provisions, the executors of the estate would have the right, at the proper time, to ask that the interest to be charged against them for delayed payment of the tax (excused under the provisions of the 5th section) should be six per cent from the date of eighteen months after the death of the decedent. The repealing act altered this provision, but at the same time saved the right which, within the meaning of the statute, had either "accrued," or was "accruing," at the time of its passage. This provision of the 5th section of the act of 1887 may well be called a right within the meaning of the act of 1892. The claim is not made that it was a "right" which could not be altered, or even totally extinguished, in the discretion of the law-making power. If it were of such a character of course the statute which assumed to do either would be ineffectual for such purpose. But it was something which, while the law remained unaltered, gave to the parties representing the estate the absolute right to have the interest charged at a certain percentage, and from a certain date, upon the fact appearing which the statute provided for. This right was subject to no discretion, and to no one's whim. Nothing but legislative enactment could alter or abridge it in the slightest degree. The legislature did thereafter alter the law, but, at the same time, said it should not affect a right already accrued, accruing or acquired. I think it would be a most narrow and unreasonable construction of those words to hold that they do not include a case like this. If there were a doubt upon the question it should be resolved in favor of the taxpayer as represented by the executors and against the taxing power. (*United States v. Wigglesworth*, 2 Story, 369; *United States v. Watts*, 1 Bond, 580; *Partington v. Atty.-Genl.*, L. R. [4 H. L.] 100, 122, and many other cases cited in the brief of counsel for the respondent.)

The statute, in my opinion, is not doubtful in construction, so far as this question is concerned, and I think the 24th section of the act of 1892 applies to this case.

The order should, therefore, be affirmed, with costs.

All concur, except ANDREWS, Ch. J., not sitting.

Order affirmed.

In the Matter of the Estate of CORNELIUS V. S. ROOSEVELT,
Deceased.

By the will of R., who died in 1887, his residuary estate was given to his executors in trust to pay the income thereof to his wife during her life. Upon her death said estate was given to beneficiaries named, subject to the payment of certain annuities specified, each given for the life of the annuitant. *Held*, that neither the annuities nor the remainders were presently taxable under the Collateral Inheritance Tax Act, in force at the time of the testator's death (Chap. 713, Laws of 1887); that as to the annuitants, they had no vested interest, and could take none until the death of the wife, and as to the remainders there was a contingency affecting them which rendered it impossible to ascertain their present fair and clear market value.

Reported below, 76 Hun, 257.

(Argued June 18, 1894; decided October 9, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 16, 1894, which reversed an order of the Surrogate's Court of New York county, which affirmed an order of the surrogate of said county assessing the value of certain interests passing under the will of Cornelius V. S. Roosevelt, deceased, and fixing the collateral inheritance tax thereon.

The facts, so far as material, are stated in the opinion.

Edward Hassett for appellant. The remainders devised to the nephews and nieces are vested remainders, and are now subject to the payment of the tax. (4 R. S. 2431, 2434, 2516; *Cook v. Cook*, 95 N. Y. 103; *Beardsley v. Hotchkiss*, 96 id. 201; 4 Kent's Comm. 202; 18 Abb. N. C. 297, 303; *Weed*

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v. *Aldrich*, 2 Hun, 531; *Williamson v. Field*, 2 Sandf. Ch. 535; *Kelso v. Lorillard*, 85 N. Y. 177; *Blanchard v. Blanchard*, 1 Allen, 227; *Sheridan v. House*, 4 Abb. Ct. App. Dec. 218; *Everitt v. Everitt*, 29 N. Y. 39; *Teed v. Morton*, 60 id. 502; *Campbell v. Stokes*, 142 id. 23; *In re Cager*, 111 id. 343; *In re Stewart*, 131 id. 274.) The annuitants are beneficially entitled in expectancy to an interest in or income from the property of the testator transferred by his will, and the tax thereon is immediately due and payable. (Laws of 1887, chap. 713, § 1; Laws of 1892, chap. 399, §§ 3, 24, 25, 26; *In re Prime*, 136 N. Y. 344.)

Geo. H. Yeaman, John E. Roosevelt and George C. Kobbe for respondents. The tax is not yet payable. (*In re Cager*, 111 N. Y. 343; Laws of 1892, chap. 399, § 23; *In re Curtis*, 73 Hun, 185.)

BARTLETT, J. The question presented on this appeal is whether the interests of the annuitants and remaindermen, under the will of the late Cornelius V. S. Roosevelt, are liable to pay presently the collateral inheritance tax. The Surrogate's Court for the county of New York determined this question in the affirmative, and its order to that effect was reversed by the General Term of the first department. The comptroller of the city of New York appeals to this court.

The testator died September 30th, 1887, and his will was admitted to probate in the county of New York March 17th, 1888. After certain specific legacies to his wife, the testator disposes of his residuary estate as follows, viz.: The entire amount to be held by the executor and the executrix in trust, to pay the income thereof to his wife during her life; at her death seven life annuities are given — to two persons \$1,000 each, to two persons \$500 each, and to three persons \$5,000 each, with interests in these latter in the nature of cross-remainders, contingent upon survival *inter sese*, the will providing as follows: "In case any one of the three last-named annuitants * * * shall die either before or after the death of my said wife, I direct my executors to pay, and I bequeath

to each of the two survivors of them an annuity of \$7,500, and in case any two of them shall die, either before or after the decease of my said wife, I direct my executors to pay and I bequeath to the last survivor of them an annuity of \$15,000."

On the decease of the wife, the estate is given, subject to the payments of the annuities, to twelve nephews and nieces. Two of these remaindermen died before the testator, and the appraiser, upon the theory there was no lapse, and that the survivors would take the whole remainder, has made his estimate accordingly. The appraiser reported in the first instance as follows: "The persons who will become entitled to the annuities mentioned in the will cannot now be determined until the death of the wife, and for that reason also the value of decedent's estate, which is devised at her death to his nephews and nieces, and subject to such annuities, cannot now be ascertained." The surrogate sustained objections to this report and the matter was sent back to the appraiser. The surrogate requested the superintendent of insurance to ascertain the value of the annuities, and acting upon his information, the appraiser reported the values of the annuities and the estates in remainder. The matter was then duly sent back to the appraiser for the third time to enable the superintendent of insurance "to correct manifest errors."

The third report of the appraiser increased the value of the compound survivorship annuities and considerably diminished the value of the estates in remainder as contained in his second report. This report was confirmed and was followed in due course of procedure by the order now here for review. We are of opinion that this case must be decided under the law of 1887 in force at the time of testator's death.

Two questions are presented for our determination, viz.: First, are the annuities created by the will such property, in a legal sense, as to be presently taxable, and can their fair and clear market value at the time of the death of the testator be ascertained; second, is the fair and clear market value at the time of testator's death, of the estates in remainder ascertain-

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able, and is the tax thereon due at once? In deciding both of these questions we are to reasonably construe the statute, and give effect, if possible, to all its provisions. As to the annuitants, the appellant's counsel contends that they are entitled to an interest in, or an income from, the property of the testator, and the statute requires the tax to be paid immediately; he goes on to say in his printed argument: "It may, of course, be considered as a hardship to compel the annuitants to pay a tax upon an interest that they may never receive, but that is the fault of the statute, and under its wording the payment of the tax can only be postponed by giving a bond." This concession admits away the entire case of the state. It is not to be assumed that the legislature intended to compel the citizen to pay a tax upon an interest he may never receive, and the reasonable construction of this statute leads to no such unjust result.

It does not follow because the legislature taxes persons beneficially entitled to property or income, in possession or expectancy, that a tax was thereby imposed upon an interest that may never vest; until that time arrives the power to tax does not exist. The testator has created seven life annuities, if the annuitants survive his wife, and there can be no vested interest in any of them until the happening of that event.

All may survive — a portion may be living — every one may be dead.

To hold such a possibility presently taxable, and its value capable of immediate computation, shocks the sense of justice.

This brings us to the remaining question as to the taxation of the estates in remainder. The testator has, on the death of his wife, given his entire estate to twelve nephews and nieces subject to the payment of the annuities. Two of these remaindermen, as already stated, died before the testator. It is contended by the respondents that it is impossible to ascertain the fair and clear market value of these remainders at the time of the death of the testator for the reason that the annuitants represent estates or interests, unvested and contingent, which, taken in connection with the life estate of the

widow, renders the present value of the ultimate remainders unascertainable.

The amount that will ultimately be paid to the remaindermen is contingent, depending on future events.

Whenever the tax on the annuities is payable the estate must pay it; what the amount of that tax will be depends upon the survivorship of annuitants and the number of life annuities, if any, that shall vest on the death of the widow. This court has recently decided that it is not the vesting of remainders that renders them contingent taxable interests under the law. (*Matter of Curtis*, 142 N. Y. 219.) In the case cited it was held that the nominal fee might never become a taxable estate, for the reason that if the nephews and nieces in whom it was claimed to have vested died without issue before the termination of certain trusts the fee would pass to lineals not taxable. This was the uncertainty which postponed the payment of the tax. In the case at bar there is a contingency affecting the value of the estate, as already indicated, which brings it strictly within the principle of the *Curtis* case.

The learned counsel for the respondents has pointed out questions that may present on the death of the widow; one involves the legal effect of the death of two remaindermen in the lifetime of the testator, and the other the correctness of the mode adopted by the superintendent of insurance in ascertaining the value of the compound survivorship annuities. These questions will become important on the falling in of the life estate, but we express no opinion in regard to them at this time.

In affirming the order of the General Term we not only give to the act of 1887 a reasonable construction, but carry out the obvious intent of the testator that his widow should enjoy, during her life, the entire income of his estate.

The legislature, in the act of 1892, has given a practical construction to its previous legislation on this subject when it provides that where the fair market value of the property or interest cannot be ascertained at the time of the transfer, the

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tax shall become due and payable when the beneficiary shall come into actual possession or enjoyment. (Chap. 399, Laws 1892, § 3.)

The order should be affirmed, with costs.

All concur, except ANDREWS, Ch. J., not sitting.

Order affirmed.

JACOB BISSON et al., Respondents, v. WEST SHORE RAILROAD COMPANY, Appellant, et al., Respondents.

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| 143 | 125 |
| 147 | 353 |

SAME, Respondents, v. CHAUNCEY M. DEPEW, Appellant, et al., Respondents.

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| 143 | 125 |
| 167 | 498 |

W. by his will gave his real estate to his wife for life if she remained unmarried, if not, until her marriage, and upon her death or marriage he gave the said real estate to his and his wife's heirs, "their heirs and assigns forever, share and share alike." In an action for partition, brought after the death of the widow, *held*, that all of the persons who at the time of the widow's death answered the description of heirs at law, either of the testator or of his widow, took an undivided interest in the lands as members of the same class *per capita* and not *per stirpes*. Reported below, 66 Hun, 604.

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| 171 | 122 |
| 143 | 125 |
| 173 | 452 |

(Argued June 8, 1894; decided October 9, 1894.)

APPEALS from judgments of the General Term of the Supreme Court in the fifth judicial department, entered upon orders made January 18, 1893, which affirmed final judgments in favor of plaintiffs entered upon reports of a referee, and also appeals from interlocutory judgments in the above-entitled actions.

These were actions for the partition of lands; formerly owned by Louis Wackerman, in Erie county, and which he disposed of by a last will in the following manner, namely: "To my said wife, Maria Bernhardina Wackerman, I give and bequeath all my real estate that I may die seized with for and during the term of her natural life, provided she, my said wife, shall remain my widow; and from and after her decease or marriage (which shall first happen) I give, devise and bequeath all my said real estate unto my heirs and my said

wife Maria Bernhardina's heirs, their heirs and assigns forever, share and share alike."

His wife survived him, but no issue; an only child of the marriage having died before the making of the will. The widow never re-married. When she died, her heirs were sixteen in number, representing three stocks; while the heirs of Louis Wackerman, her husband, then were fourteen in number, representing four stocks.

At the date of his, the testator's death, the representatives upon his and his widow's side had been as follows, viz.: upon his side the heirs were ten in number and represented five stocks, and upon her side they were eleven in number and represented three stocks. The plaintiffs contended that the heirs of Louis Wackerman and those of Maria, his wife, are entitled, each, to an equal share in this estate; while the defendants contend that the estate vested one-half thereof in the one set of heirs and one-half thereof in the other set; and that each class took *per stirpes*.

The referee held that all those persons who, at the time of the widow's death, would answer the description of heirs at law, either of the testator, or of his widow, took an undivided interest in the lands, as members of the same class, *per capita* and not *per stirpes*. The General Term affirmed the judgment upon the referee's report and the defendants appealed to this court.

Ashbel Green for appellant. Courts, in construing a will, regard the circumstances under which it was made — the state of the testator's property, and of his family, and other similar circumstances. (4 Kent's Comm. 533; 1 Jarman on Wills, 422; *Ritch v. Hawkhurst*, 114 N. Y. 512; *Bond's Appeal*, 31 Conn. 190; *Williams v. Bradley*, 3 Allen, 280; *De Witt v. Yates*, 10 Johns. 156; *Blake v. Hawkins*, 98 U. S. 324.) When a will is capable of two interpretations, that one should be adopted which prefers those of the blood of the testator to strangers. (*Van Kleeck v. Dutch Church*, 20 Wend. 457; *Scott v. Guernsey*, 48 N. Y. 106; *Queen v. Hardenbrook*, 54

id. 86; *Kelso v. Lorillard*, 85 id. 182; *Wood v. Mitcham*, 92 id. 379.) If the will "is equally susceptible of one or another interpretation the court should, on every principle of right and within the spirit of all the authorities, give it that which is most equitable and consonant with the dictates of justice." (*In re Paton*, 111 N. Y. 486; *In re Brown*, 93 id. 295.) The distribution of estates *per stirpes* among the representatives of deceased persons is well established as the most equitable disposition, and is in harmony with the dictates of natural feeling. (*Parish v. Delafield*, 25 N. Y. 9; *Clark v. Lynch*, 46 Barb. 81.) Where the gift is to persons in different degrees of relationship to the testator, an intent to divide *per capita* rather than *per stirpes* must be shown by the unmistakable terms of the will. (*Clark v. Lynch*, 46 Barb. 68; *Coster v. Butler*, 63 How. Pr. 311.) A nephew of the testator's wife should not take an equal share with a brother of the testator himself, without the strongest possible indication of the testator's intent. But, under the plaintiff's contention, this is precisely what occurs. This is a construction at "variance with the natural disposition of mankind." (*Talcott v. Talcott*, 39 Conn. 189; *Woodward v. Jones*, 115 N. Y. 359; *Clark v. Lynch*, 46 Barb. 81; *Cushman v. Horton*, 59 N. Y. 149; *Clark v. Cordis*, 4 Allen, 466; *Rand v. Sanger*, 115 Mass. 124; *Daggett v. Slack*, 8 Metc. 454; *Balcom v. Haynes*, 14 Allen, 204; *Woodward v. James*, 44 Hun, 95.) Where the estate is to be divided "equally," or "share and share alike," if these words can be satisfied under a division among the beneficiaries *per stirpes*, such division will be made. (*Clark v. Lynch*, 46 Barb. 68; *Brett v. Horton*, 5 Jur. 696; *Balcom v. Haynes*, 14 Allen, 204.) At the death of the testator an undivided one-half interest in all his real estate vested in his heirs as a class, subject to his wife's life estate. (*Campbell v. Rawdon*, 18 N. Y. 412; *Lane v. Brown*, 20 Hun, 382; *Stevenson v. Lesley*, 70 N. Y. 512.)

Joseph H. Burr for respondents. The referee correctly held that the devise of the remainder of Louis Wackerman's

will was a devise to a single class, to take effect upon the death of his wife, such class consisting of all persons who at that time would answer the description either of his heirs or her heirs. (*Armstrong v. Moran*, 1 Bradf. 314.) Where there is a devise to a class and the direction of the will is that the estate shall be "equally divided," or "share and share alike," the members of the class take *per capita* and not *per stirpes*, in the absence of affirmative evidence of a contrary intent in the will, and this is so even though the devisees stand in different degrees of consanguinity to the testator. The use of these words supersedes the measure of distribution by the statute. (*Blackler v. Webb*, 2 P. Wms. 383; *Murphy v. Harvey*, 4 Edw. Ch. 131; *Myers v. Meyers*, 23 How. Pr. 410; *Bunner v. Storm*, 1 Sandf. Ch. 357; *Seabury v. Brewer*, 53 Barb. 663; *Armstrong v. Moran*, 1 Bradf. 314; *Lee v. Lee*, 39 Barb. 172; *Stevenson v. Lesley*, 70 N. Y. 512; *Morgan v. Pettit*, 3 Dem. 61; *In re Verplanck*, 91 N. Y. 439; *Graves v. Graves*, 55 Hun, 58; 126 N. Y. 636.) It is no objection to this construction of the will that while the heirs of Mr. Wackerman were necessarily determined at his death, the heirs of Mrs. Wackerman could not be determined until her death. (*Moore v. Littell*, 41 N. Y. 61; *Sheridan v. House*, 4 Keyes, 569; *Tucker v. Bishop*, 16 N. Y. 402; *Teed v. Morton*, 60 id. 506; *Johnson v. Valentine*, 4 Sandf. 37; 3 Washb. on Real Prop. 511; *Stevenson v. Lesley*, 70 N. Y. 512.) No inference can be drawn as to the probable intent of the testator from the fact that under this construction persons in different degrees of consanguinity to the testator took equal shares of his estate. (*Peacock v. Faulkner*, 1 Bro. C. C. 296.)

GRAY, J. In the construction of wills, the court must look for something which will exhibit the intention of the testator; either actually, or so suggestively as to permit it to be inferred.

If the instrument is silent as to intention and stands as a mere expression of a will, effect must be given to it according to those rules, which, from long acquiescence, have acquired the force of

authority. The present seems to be such a case. We are without any indication as to the intentions of the testator in making this disposition of his realty, other than in the particular clause of the will itself.

Therefore, I am the less reluctant to yield my views to those entertained by the majority of the members of this court.

Upon its face, the testamentary clause refers to two classes of heirs, and that the estate should be divided between them, giving one-half to each class, has seemed to me to be, under the circumstances, the juster disposition to make; because such an intention seems the more natural one to be attributed to the testator. This view is not without support in the cases. (*Holbrook v. Harrington*, 16 Gray, 102; *Bassett v. Granger*, 100 Mass. 348.) The clause is, however, deemed, from its peculiar arrangement, to resolve all, who would be heirs of the testator, or of his widow, at her death, into one class; to each individual of which was given an equal interest. In the absence of anything to show a contrary intention, I am obliged to admit that the language of the clause gives warrant to that conclusion. In affixing, to the gift of his estate to his heirs and his wife's heirs, the words "their heirs and assigns forever, share and share alike," the testator may be said by his language to have grouped all of the heirs in one class; the individuals of which are indistinguishable one from the other as objects of his bounty.

There being but the one class, there can be no doubt but that the division must be made *per capita* among the persons entitled and not *per stirpes*. I think the words "share and share alike" make that sufficiently clear. Such a direction cannot be distinguished, practically, from one to divide equally. (*Mattison v. Tanfield*, 3 Beavan, 131.)

The testator has used the word "heirs" to describe the persons who are to take and not to fix the interest which would vest in each person by virtue of his heirship, or representation of a stock—a preferable construction where the context will permit.

His gift is to a class, to be composed of those who are his or his wife's heirs, and the members take as purchasers and as though each had been named. The word "heirs," while generally and technically conveying the idea of representation, is not necessarily always to be understood in that sense. Though a word of limitation, it may be used, as it is here, as one of designation of the devisees, in whom at a fixed time the estate devised shall vest in possession. So, it has been held that if a bequest is made to "issue" as purchasers, all those who answer the description will take *per capita*; in the absence of anything to show an intention that they shall take *per stirpes*. (*Davenport v. Hanbury*, 3 Ves. 257; *Leigh v. Norbury*, 13 id. 340.)

Though the heirs of the testator were determinable at his death, yet the gift to them was not, by the terms of the will, to vest in possession until after the termination of the life estate given to the widow. That was the time fixed for the gift to take effect and then was the time when the persons would be ascertained, who, coming under the description of heirs of the testator, would be entitled to share with the heirs of his widow, in the distribution of the estate. Within that time the number of his heirs might be diminished by death, or increased by births. (See *Stevenson v. Lesley*, 70 N. Y. 512; *Teed v. Morton*, 60 id. 506.)

The application of the rule that the division of the estate is to be *per capita*, in a case where the language of the gift, like the present case, requires equality in the shares, is sanctioned by authority.

It was early held that where the subject of the testamentary gift was to be "equally divided," the persons would take *per capita*, among whom the division is to be made; unless a contrary intention is discoverable in the will. (*Murphy v. Harvey*, 4 Edw. Ch. 131; *Bunner v. Storm*, 1 Sandf. Ch. 357; *Collins v. Hoxie*, 9 Paige, 81.) In *Stevenson v. Lesley* (70 N. Y. 512) the testator used the words "share and share alike" and they were considered as a direction to divide *per capita*. In that case, Judge ANDREWS relied, as did also the

chancellor and the assistant vice chancellor in *Collins v. Howie* and in *Brunner v. Storm*, upon the decision, among others, of Chancellor KING in *Blackler v. Webb* (2 P. Wms. 383). That case, though the subject of much criticism, has never been rejected as an authority in this state. Its existence as a rule of construction has been recognized; but its application has been closely confined to cases where nothing in the context of the will can be referred to, to control the language of a devise or bequest, which places all the persons, who are to benefit by it, upon an equality; irrespective of their different degrees of relationship to the testator. Undoubtedly, and very justly, that rule has yielded and should yield, as it has been said, "to a very faint glimpse of a different intention in the context." (2 Jarman on Wills, 1051, and see *Ferrer v. Pyne*, 81 N. Y. 284; *Vincent v. Newhouse*, 83 id. 505; *Woodward v. James*, 115 id. 346.)

In *Brunner v. Storm* (*supra*) the assistant vice chancellor admitted that if certain testimony could have been received, it would be strong, if not conclusive, evidence to show that the *per capita* rule of division was not within the intention of the testator; but he felt compelled to attribute that intention only which the plain language of the will evidenced. In *Ferrer v. Pyne* and in *Vincent v. Newhouse*, DANFORTH, J., who delivered the opinion of the court in each case, observed that it was unnecessary to go to the length, to which some courts have gone, of rejecting the rule of *Blackler v. Webb*; because wherever the rule is adopted, it is also held to be governed by the context. Two cases, where the rule of division *per capita* has been followed, are somewhat instructive. In *Mattison v. Tanfield* (3 Beav. 131), the testator devised certain real estate in trust "for the person or persons, who at the time of my decease shall be the next of kin of R. D.; * * * according to the statute made for the distribution of intestate's effects * * * as tenants in common" etc. At his death, R. D.'s descendants stood in different degrees of propinquity and the question was whether they were to take *per capita* or *per stirpes*. Lord LANGDALE, master of the rolls, stated the

question to be "whether the words of the will import an intention that the next of kin, though some of them derive their character as such by representation, are, nevertheless, to take *per capita*" and he said: "The case seems to show that the word 'equally,' or the words 'share and share alike,' would there have had that effect. But the gift in this case is to the persons and their heirs as tenants in common and these words are not exclusively applicable to equal interests, as the words 'equally' and 'share and share alike;' and there being nothing in the will to show a contrary intention, I think that the parties * * * must, under the will, take by virtue of representation." He directed the distribution, therefore, to be *per stirpes*. In *Dugdale v. Dugdale* (11 Beav. 402), Lord LANGDALE applied the *per capita* rule in the division of a bequest; where it was to be equally divided amongst the next of kin of testator, both maternal and paternal, as should be living at the time of his death. When that event happened, there were two next of kin *ex-parte paterna* and one *ex-parte materna*.

Unlike most cases, in which the question would arise, we have nothing in this will to justify us in refusing to follow the direction apparent upon the face of the clause containing the devise, and, for the reasons stated, we hold that the devise here was to a single class, consisting of all those individuals who, at the time of the death of testator's widow, would answer the description of his heirs or of her heirs, and that all such would take *per capita*.

The judgment appealed from, in each of these cases, should be affirmed; with costs to the respondents.

All concur.

Judgment affirmed.

CHARLES EELS, Respondent, v. THE AMERICAN TELEPHONE
AND TELEGRAPH COMPANY, Appellant.

The state can neither itself appropriate to its own special, continuous and exclusive use, nor can it authorize a corporation to so appropriate, any portion of a rural public highway, by setting up poles therein for the purpose of supporting telegraph or telephone wires.

The question as to the legality of such a use is not affected by the fact that the legislature by statutory enactments has manifested its belief in the existence of such a right, or by the fact that adjoining owners have generally acquiesced in such a use.

Where, therefore, a telegraph and telephone company, organized under the laws of this state (Chap. 265, Laws of 1848, as amended by chap. 471, Laws of 1853), had, without the consent of an adjoining owner, who owned the fee of a highway, and without having acquired the right by condemnation proceedings, erected its poles in the highway and strung wires thereon for the purposes of its business, *held*, that such a use of the highway was unlawful; and that an action of ejectment was maintainable against it.

Reported below, 65 Hun, 516.

(Argued June 5, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 4, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

This was an action of ejectment.

The facts, so far as material, are stated in the opinion.

Sherman S. Rogers for appellant. The maintenance and operation of the telephone line over the highway is a legitimate and proper use thereof so far as the public is concerned. The authority so to use it was conferred by legislative act. (Laws of 1848, chap. 265; 3 R. S. 2061; Laws of 1853, chap. 47; 3 R. S. 2063; *Atty.-Gen. v. T. Co.*, L. R. [6 Q. B. Div.] 244; *C. T. Co. v. U. E. R. Co.*, 42 Fed. Rep. 275; Thompson on Electricity, 101; *H. R. R. R. Co. v. W. T. & R. Co.*, 135 N. Y. 393, 405.) The maintenance of the telephone line did not impose an additional servitude upon the fee. (*Pierce v. Drew*, 136 Mass. 75, 79; *W. U. T. Co. v. Williams*, 86

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Va. 696; *J. B. Assn. v. B. T. Co.*, 88 Mo. 258; *Witcher v. H. W. W. Co.*, 66 Hun, 619; *P. W. W. Co. v. Birch*, 130 N. Y. 249; *Bolling v. Mayor, etc.*, 3 Rand. 563; *Dickerson v. Colgrove*, 100 N. J. 578.)

Melville Egleston for appellant. The erection of the defendant's telephone line upon the highway was duly authorized by law. The defendant is a telegraph company. (*Duke v. C. N. J. T. Co.*, 53 N. J. L. 341; *Telephone Cases*, 126 U. S. 6; *Comm. v. P. T. Co.*, 42 Leg. Int. 180; *C. & P. T. Co. v. B. & O. T. Co.*, 66 Md. 399; *W. T. Co. v. Oshkosh*, 62 Wis. 32; *C. T. & T. Co. v. U. E. R. Co.*, 42 Fed. Rep. 273.) The legislature may authorize the erection of a telegraph or telephone line on a highway without compensation to the owner of the fee. (*Pierce v. Drew*, 136 Mass. 75; *J. B. Assn. v. B. T. Co.*, 88 Mo. 258; *P. T. Co. v. W. U. T. Co.*, 94 U. S. 1; *Elliott v. F. H. & W. R. R. Co.*, 32 Conn. 581; *People v. Kerr*, 27 N. Y. 188; *Wager v. T. U. R. R. Co.*, 25 id. 526; *Story v. N. Y. E. R. R. Co.*, 90 id. 148; *Briggs v. H. R. R. Co.*, 79 Maine, 363; *Olinda v. Lathrop*, 21 Pick. 292; *Tucker v. Tower*, 26 id. 109; *Cushing v. Boston*, 122 Mass. 173; *Atty.-Gen. v. M. R. R. Co.*, 125 id. 515; *Chapman v. A. & S. R. R. Co.*, 10 Barb. 360.)

John M. Hull for respondent. Plaintiff's title extends to the center of the highway. (*Greer v. N. Y. C. & H. R. R. Co.*, 37 Hun, 346; *Perrin v. N. Y. C. & H. R. R. Co.*, 36 N. Y. 120; *Bissell v. N. Y. C. & H. R. R. Co.*, 23 id. 61; *Story v. N. Y. E. R. R. Co.*, 90 id. 122; Tyler's Law of Boundaries, chap. 9; Gerard's Title to Real Estate [3d ed.], 518; *Wager v. T. U. R. R. Co.*, 25 N. Y. 526; *Sharp v. Spear*, 4 Hill, 76.) There was no consent or acquiescence on the part of the plaintiff such as to estop him from maintaining ejectment. (*Lux v. Haggin*, 69 Cal. 266; *Biddle Boggs v. M. Min. Co.*, 14 id. 279; *N. Y. R. Co. v. Rothery*, 107 id. 310; *Leonard v. Spencer*, 108 id. 338-346; *Viele v. Judson*, 82 id. 32-40; *T. H. R. Co. v. Rudel*, 89

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Ind. 128; *Boyce v. Watrous*, 73 N. Y. 597; *Vandervoort v. Gould*, 36 id. 639; *Murdock v. P. P. & C. I. R. R. Co.*, 73 id. 579.) Placing telegraph and telephone poles and wires in highways is an additional burden upon the soil, and constitutes a taking which requires compensation to be made (*Peck v. Smith*, 1 Conn. 130; *Goodtitle v. Acker*, 1 Burr. 133; Tyler's Law of Boundaries, chap. 9; *Knox v. Mayor, etc.*, 55 Barb. 404; *Van Brunt v. Town of Flatbush*, 128 N. Y. 50; Cook's Highway Laws of N. Y.; Cooley on Const. Lim. 559; *Kane v. N. Y. E. R. R. Co.*, 125 N. Y. 164; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; *Smith v. C., etc., Tel. Co.*, 2 Ohio, 259; *A., etc., T. Co. v. C., etc., R. R. Co.*, 6 Biss. 158; *A. T., etc., Co. v. Pearce*, 71 Md. 535; *W. U. T. Co. v. Williams*, 86 Va. 696; *Willis v. E., etc., Co.*, 37 Minn. 347; *M., etc., Co. v. C. L. Co.*, 67 How. Pr. 365; *Blashfield v. E. S. T. & T. Co.*, 18 N. Y. Supp. 250; *C. & P. T. Co. v. Mackinzie*, 21 Atl. Rep. 690; *State v. C. N. J. T. Co.*, Id. 460; *Broome v. N. Y. & N. J. T. Co.*, 42 N. J. Eq. 141; Thompson on Law of Electricity, § 18; *King v. Ward*, 4 Ad. & El. 384.)

PECKHAM, J. The sole question involved upon this appeal is the extent of the public easement in a rural highway, the fee of which is in the adjoining owner. The plaintiff herein is the owner in fee subject to the public easement of the premises in question, which constitute part of a public highway in the town of Alden and county of Erie, in this state. The defendant occupies a portion of the highway with its poles upon which it has strung its wires for the purpose of conducting its business as a telephone and telegraph company. It is incorporated and organized under the laws of this state for the incorporation and regulation of telegraph companies. The plaintiff claims that the defendant has no right to occupy any portion of the public highway with its poles, and he has, therefore, commenced this action of ejectment to recover the premises described in the complaint, subject to the public easement therein for a highway. The court upon the trial

directed a verdict for the plaintiff, and the judgment entered upon it having been affirmed by the General Term, the defendant has appealed here.

The defendant admits that if the use it makes of the highway is outside the scope of the public easement, then the consent of the owner of the soil is necessary, or compensation must be made him for such use.

By the fifth section of chapter 265 of the Laws of 1848, providing for the incorporation and regulation of telegraph companies, as amended by the second section of chap. 471 of the Laws of 1853, it is provided that telegraph corporations may construct their lines upon any of the public roads, streets or highways of the state, provided the same shall not be so constructed as to incommode the public use of the roads or highways; and they are also authorized to construct the same upon any other land, subject to the right of the owner to full compensation therefor. It has been held that a telephone company is, within the provision of the statute, a telegraph company. (*Telephone Cases*, 126 U. S. 6; *Telephone Co. v. Turnpike Co.*, 135 N. Y. 393, 404.) The defendant does not, however, contend that the statute gives any right to these companies to make use of the highway for the purpose of constructing their lines thereon without compensation to the owner of the fee of the highway, unless such use is in its nature a part of the public easement for which highways are constructed.

The statute, therefore, does not aid in the decision of this question, but it is cited by the defendant as evidence of legislative belief that such use of the highway was legitimate and within the purpose for which highways were laid out. Defendant also urges that some weight is to be attached to the alleged fact that this use of the highway has been very generally acquiesced in by the adjoining owners of the land and that such acquiescence is quite strong evidence that the use was proper.

The question is one plainly of law, and whatever may have hitherto been the legislative belief or the opinion of the

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adjoining owners as to the propriety of this use of a rural public highway, it must be decided by us in accordance with our own view as to what the law is upon this subject. The length of time which any particular adjoining owner has acquiesced in this use of a highway, the circumstances attending upon and surrounding that acquiescence, the probable considerations operating either to create or to continue it, are all alike matters upon which the court is completely ignorant, and any opinion as to the legality of the use founded upon an acquiescence by the adjoining owners under circumstances unknown to the court, must in its very nature be almost if not entirely worthless. The argument founded upon the legislative belief of the legality of such use has also very little weight. There was no warranty implied from the passage of the statute that the consent of the state alone was necessary. All the facts were known to all the parties, and whether, in addition to the consent of the state, that of the adjoining owners was necessary, was a matter which the state might well leave to the parties interested to try out when the point arose. The question has never been covered up or otherwise concealed, and at the most it can only be urged that the legislature was of the opinion, upon this purely legal question, that the consent of the adjoining owner was not necessary. It is not contended that if it had held the other opinion it would have legislated any more favorably for the companies. If such consent were necessary it was on account of the constitutional provision that private property should not be taken for public use without due compensation, and this provision the legislature could neither alter nor efface. The companies cannot, therefore, be legally said to have suffered anything by reason of this legislative opinion, and they are not on that account in any position to appeal to a specially favorable construction of the law in their behalf. The legislature could have provided that in all future dedications of land for a public highway, and in taking land under the right of eminent domain for that use thereafter, the right to use it for the purpose for which defendant now uses

the highway in question, should be implied in such dedication and paid for when taken. That would have no effect upon land already dedicated or taken for a highway, and could not aid the defendant. An alleged practical construction of the law for many years by the general public in favor of the defendant's contention, cannot be the foundation upon which, if proved, to base a legal claim on the part of the defendant, and unless it can show that its use of the highway at the *locus in quo* is within the limitation of the public easement, it can create no right of continuance in such use arising from a general public acquiescence in its claim, provided the plaintiff or those under or through whom he claims have not given expressly or by implication the requisite consent. What other parties may have thought or what action they may have taken upon such a question, and with regard to their lands, cannot in any manner conclude or affect the plaintiff when he chooses to deny the existence of defendant's right to use land of which plaintiff owns the fee, subject to the public easement therein for a public highway. We agree with the learned counsel for the defendant that the question is not essentially different from that which would arise if the state itself, through its public officers, by virtue of an act of the legislature, should attempt to operate a telegraph line by means of poles, etc., placed in a public highway and without the consent of, or compensation made to, the adjoining owners who owned the fee of the highway subject to the public easement. If the state could itself do such an act it could create and authorize a corporation to do it.

We think neither the state nor its corporation can appropriate any portion of the public highway permanently to its own special, continuous and exclusive use by setting up poles therein, although the purpose to which they are to be applied is to string wires thereon and thus to transmit messages for all the public at a reasonable compensation. It may be at once admitted that the purpose is a public one, although for the private gain of a corporation, but the Constitution provides that private property shall not be taken for public use without

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compensation to the owner. Where land is dedicated or taken for a public highway, the question is what are the uses implied in such dedication or taking? Primarily there can be no doubt that the use is for passage over the highway. The title to the fee of the highway generally remains in the adjoining owner, and he retains the ownership of the land, subject only to the public easement. If this easement do not include the right of a telegraph company to permanently appropriate any portion of the highway, however small it may be, to its own special, continuous and exclusive use, then the defendant herein has no defense to the plaintiff's claim. Although the purpose of a public highway is for the passage of the public, it may be conceded that the land forming such highway was not taken for the purpose of enabling the public to pass over it only in the then known vehicles, or for using it in the then known methods for the conveyance of property or the transmission of intelligence. Still the primary law of the highway is motion, and whatever vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move and the intelligence be transmitted by some moving body which must pass along the highway, either on or over, or perhaps under it, but it cannot permanently appropriate any part of it.

In the case at bar the fee in the highway at the point in controversy is in the plaintiff, but I do not regard that fact as controlling upon the question of the proper use of the highway. Of course the plaintiff could not recover in this form of action unless he owned the fee in the highway at this particular point, but I do not think the proper use of the highway depends upon the question as to who owns the fee thereof. I think that the rights of the public in and to the highway remain the same wherever the fee thereof may be placed. (2 Dill. on Munic. Corp. 698a, etc.) As the fee in this case is in the plaintiff, the discussion of the question must be had with reference to that fact. Where one owns to the center of a street in a city, it has been held that the laying of the rails for a horse railroad imposed an additional burden upon the

land forming the street, for which the owner was entitled to compensation. (*Craig v. Railroad Co.*, 39 N. Y. 404.) Although relief was denied a plaintiff who did not own the fee, and who desired to enjoin the use of the street by a horse railroad company, it was denied upon the ground that there was no taking of the property of the plaintiff by the company, and that being authorized by the legislature the plaintiff could not complain. (*Kellinger v. Railroad Co.*, 50 N. Y. 206.) The plaintiff sought in that action to recover damages for inconvenience of access to his adjoining lands. In the *Craig* case (*supra*) the case was decided upon the idea that there was an exclusive occupation of the street which amounted to an additional burden upon the land. The cases upon the subject of railroads in streets are cited and commented upon in *Fobes v. Railroad Co.* (121 N. Y. 505); *Kane v. Railroad Co.* (125 id. 164), and *Reining v. Railroad Co.* (128 id. 157), and they show that the primary or fundamental idea of a highway is that it is a place for uninterrupted passage by men, animals or vehicles, and a place by which to afford light, air and access to the property of abutting owners, who, in this respect, enjoy a greater interest in the street than the general public, even though their title to the land stops with the exterior line of the street. It is not a place which can be permanently and exclusively appropriated to the use of any person or corporation, no matter what the business or object of the latter might be. It was because the highway was permanently, and, to some extent, exclusively appropriated by the elevated railroads that it was held their erection, without the consent of the abutting owners, was illegal. (*Story v. Railroad Co.*, 90 N. Y. 122.)

We cannot agree that this permanent appropriation and exclusive possession of a small portion of the highway can properly be regarded as any newly discovered method of exercising the old public easement, for the very reason that this so-called new method is a permanent, continuous and exclusive use and possession of some part of the public highway itself, and, therefore, cannot be simply a new method of exercising such

old public easement. It is a totally distinct and different kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity, or in the manner, method or means of locomotion. All these might be varied, increased as to number, capacity or form, altered as to means or rapidity of locomotion, or transformed in their nature and character, and still the use of the highway might be substantially the same, a highway for passage and motion of some sort. Here, however, in the use of the highway by the defendant is the fact of permanent and exclusive appropriation and possession, a fact which is, as it seems to us, wholly at war with that of the legitimate public easement in a highway. The following are some of the many authorities which hold that the easement is one of passage only: *Goodtitle v. Alker* (1 Burr. 133); *Prest. Soc. of Waterloo v. Railroad Co.* (3 Hill, 557), and cases cited; *Van Brunt v. Town of Flatbush* (128 N. Y. 50, 55). Defendant argues that the case in 3 Hill (*supra*), while announcing the principle above stated, yet did not, in fact, involve the question and is not authority to be regarded, while the cases cited in the opinion in that case the defendant claims do not really support the principle.

We think the case in Hill correctly states the law upon the subject, and that case has been very frequently cited with approval by this court to sustain the above proposition, and among the cases where such citations are to be found is that of *Bloomfield, etc., Co. v. Calkins* (62 N. Y. 386).

That case is, as we think, substantially decisive of this one. It was there decided that plaintiff had no right to lay its gas pipes in a country highway without the consent of, or compensation to, the owner of the fee. It was also reiterated that the right of the public was a mere right of passage and the fee of the land remained in the owner for all other purposes. As to whether there is a different or more comprehensive right in regard to streets in cities, the case does not decide, although it is intimated the right may be greater there than in a purely country highway.

While concurring in the view that the easement in a public street in a city or village may well be greater as the actual necessities of the case are greater for sewers and gas and water pipes, yet in this case, as we have to deal only with the easement in a purely country highway, it is not important to discuss how the easement became greater in the one case than in the other, or as to the time when the right to the enlarged use of the highway or street attaches, or the method or means by which the right to such enlarged use was attained. Density of population creates public necessities for water, light, drainage and other conveniences which do not exist in purely rural districts and along a purely rural highway. Yet the same land might alter from a country highway to a city street, and it might be determined that there was an implied dedication of the country highway at the time the land was taken to the uses which the future village or city street might require. We do not decide as to that matter, nor do we intimate that the defendant would or would not have the right to place its poles in the city street without compensation to the owner, if he owned to the center of the street.

The argument is pressed upon us that the question to be decided in this case is new and that it ought to be decided with reference to the wants and customs of the advancing civilization which it is alleged is doing so much to render life more comfortable, attractive and beautiful. Courts are frequently addressed with such arguments, which are quite forcible, and they have in this case been very eloquently, plausibly and aptly advanced. The answer to be made is that, although this particular phase of the question, strictly speaking, may itself be new, yet the principle which governs our decision is as old almost as the common law itself; and in deciding this appeal favorably to the defendant herein, we should be overturning and making nothing of cases which have been regarded as the law for generations past. A majority of the states, whose courts have considered the question, have decided it in accordance with our own views. The cases are collected in the brief of the learned counsel for the respondent herein. Let

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the defendant pay the owners for the value of the use it makes of the land outside and beyond the public easement in the highway, and the necessity of the broader decision is done away with. It has the power to take the land upon making compensation, and hence the refusal of an owner will not stop the proposed undertaking. The amount of the compensation is not now the question, but that, in many cases, it can be anything more than merely nominal would seem to be a proposition which would not require great elaboration of argument to make plain. The use would frequently be but a technical encroachment upon the rights of the adjoining owner, and there would be but little fear that anything more than nominal damages would be allowed. This cannot, however, alter the legal rights of the parties, and, in regard to them, we think the courts below have decided correctly, and the judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed. _____

CHARLES BEARDSLEY, Respondent, v. GEORGE H. COOK,
Appellant.

Defendant and D. & F. entered into a contract by which the latter agreed to furnish all the material and labor required in the erection of two houses for the former; the agreed compensation to be paid in instalments, the last instalment to be paid when the work was completed. Plaintiff contracted with D. & F. to furnish a portion of the material required. After said parties had entered upon the performance of their respective contracts, D. & F. gave to plaintiff a written order requesting defendant to retain and pay to plaintiff from the last payment to be made to them under their contract with defendant, the sum of \$1,175. This order defendant accepted. In an action to recover the amount thereof it appeared that D. & F. failed to perform their contract. *Held*, that defendant's acceptance contemplated a performance of their contract by D. & F. so as to entitle them to the last payment, and defendant's obligation to plaintiff was that in case of such performance he would retain from such payment sufficient to pay plaintiff the amount specified.

By the terms of the contract the payments were to be made upon certificate of the architect of performance. It also contained a provision that in

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case D. & F. failed to perform, defendant might complete the work and deduct the expense of completion from any balance unpaid upon the contract. Defendant did complete the houses under this provision, but the amount expended by him in so doing was not found, the trial court refusing to make a finding on that subject, it holding that the builders had performed. *Held*, that defendant, when he elected to complete the contract instead of insisting upon performance by the builders, became liable to pay to plaintiff any part of the last payment which remained in his hands after deducting the expenses of completion; that the architect's certificate was not necessary, and that as to such remainder the acceptance of the order operated as an equitable assignment thereof, which could not be affected by payments to the builders in advance of the work or a mechanic's lien subsequently filed; but that plaintiff was bound to show an amount still remaining in defendant's hands over and above what he had expended, which was applicable to the payment of the order, and in the absence of such proof was not entitled to recover. *Beardsley v. Cook* (67 Hun, 101), reversed.

(Argued June 13, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 13, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought upon the following order:

"Mr. GEORGE H. COOK,

"No. 50 Broadway, N. Y. City:

"Retain and pay to Charles Beardsley of Poughkeepsie, N. Y., from the last payment to be made by you to us on account of our contract for building houses in Dean street, Brooklyn, the sum of eleven hundred and seventy-five (\$1,175) dollars, according to the terms of our contract with Mr. Beardsley.

"DAVIS & FAY.

"Dated NEW YORK, December 11, 1890."

The facts, so far as material, are stated in the opinion.

John H. Clapp for appellant. The denial of the motion to dismiss the complaint, made at the end of the plaintiff's case, was error, and the exception thereto well taken, for the

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reason that before the plaintiff could recover he was compelled to show that the last payment to be made on account of the contract was due and payable, as the order sued upon was payable out of the last payment. (*Quinn v. Aldrich*, 70 Hun, 205.) The finding of the General Term, that the order when it was given operated as an assignment of any fund due the drawer at that time, and also to assign any funds as fast as they became due was erroneous. (*Quinn v. Aldrich*, 70 Hun, 205.) The plaintiff could not recover unless Davis & Fay, the original contractors from whom he received the order, were entitled to recover. Before Davis & Fay could recover they were bound to prove that they had obtained the architect's certificate, or that it was unreasonably withheld. (*Smith v. Brady*, 17 N. Y. 103; *Glacius v. Black*, 50 id. 148; *Nolan v. Whitney*, 88 id. 648; *Byron v. Low*, 109 id. 291; *Sweet v. Morrison*, 116 id. 19; *Wright v. Reusens*, 133 id. 298; *Weeks v. O'Brien*, 141 id. 99.) Before the plaintiff could recover it was incumbent upon him to prove, and the trial court would have to find, that the condition precedent was performed and that the last payment had become due to the contractors. (*Crane v. Knubel*, 61 N. Y. 645.)

Henry Bacon for respondent. The defendant having elected not to claim a forfeiture of his contract with Davis & Fay, but having completed the buildings under their contract, at their risk, plaintiff, as assignee of Davis & Fay, is entitled to recover whatever balance remains of the final payment after deducting the expenditures made by the plaintiff after he took charge of the work and in completing the buildings. (*Murphy v. Buckman*, 66 N. Y. 297; *Van Clief v. Van Vechten*, 130 id. 571; *Ogden v. Alexander*, 140 id. 356.) The defendant having elected to proceed and complete the buildings under the contract, the architect's certificate was not required in order to entitle plaintiff to recover. (*Kingsley v. Brooklyn*, 78 N. Y. 200; *Crouch v. Gutmann*, 134 id. 45; *Weeks v. O'Brien*, 141 id. 199.) The defendant having accepted the draft, and it having been given for value, it

operated as an assignment of so much of the moneys due or to become due to Davis & Fay under their contract. After the delivery of the draft and acceptance by the defendant, he could not appropriate any moneys coming due to Davis & Fay on the final payment under their contract to any other purpose than the payment of that draft. (*Loury v. Stewart*, 25 N. Y. 239; *Risley v. Smith*, 64 id. 576; *Gibson v. Lenane*, 94 id. 183; *Stevens v. Ogden*, 130 id. 182; *Kingsley v. Brooklyn*, 78 id. 200; *Brill v. Tuttle*, 81 id. 454.) The mechanics' liens filed form no defense against the plaintiff's claim because the defendant cannot be compelled to pay any more than is called for by his contract with Davis & Fay. (*Lauer v. Dunn*, 115 N. Y. 405; *Stevens v. Ogden*, 130 id. 182; *Crouch v. Gutmann*, 134 id. 45.) Complete performance of their contract by Davis and Fay was waived, and the building completed for them by the defendant. (*Nolan v. Whitney*, 88 N. Y. 648; *Flaherty v. Miner*, 123 id. 382; *Crouch v. Gutmann*, 134 id. 45-54.)

O'BRIEN, J. About the first of August, 1890, the defendant entered into a written agreement with the firm of Davis & Fay, builders, whereby they agreed to furnish all the materials and labor in the erection of two houses for the defendant, to be completed on or before January 1, 1891, for the sum of \$6,381, to be paid in installments as the work progressed and reached certain stages, the last payment, amounting to the sum of \$2,181, to be paid when the houses were completed.

About a month afterwards the plaintiff contracted, in writing, with Davis & Fay to furnish for these houses all the necessary interior and exterior trim, including doors, sash, blinds, wainscot, complete, except the Venetian blinds; the window frames and stairs to be all cleaned and prepared for finish in the natural wood, for the sum of \$1,175, to be paid as follows: \$150 when sash delivered, \$200 when the standing trim was on, \$400 when the doors were hung, and \$425 when the houses were completed. The builders entered

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upon the performance of their contract with the defendant, and the plaintiff on the performance of his contract with them, and on the 11th of December, 1890, a considerable part of the work had been done, when the plaintiff procured from the builders a written order upon the defendant, signed by them, and addressed to him, in which they requested the defendant to retain and pay to the plaintiff, from the last payment to be made to them under their contract, the sum of \$1,175, according to the terms of their contract with the plaintiff. The defendant wrote across the face of this order his acceptance of the same. This action was brought upon the defendant's contract with the plaintiff as evidenced by his acceptance of the order, and the plaintiff has recovered. The defendant's obligation to the plaintiff, as expressed in the acceptance, was that he would retain in his hands from the last payment due upon his contract with the builders, sufficient to pay the plaintiff. The arrangement contemplated that the builders would perform their contract with the defendant, and thereby become entitled to the last payment, and that the plaintiff would perform his agreement with the builders, and thus entitle himself to call upon them to pay as they had agreed, and upon the defendant to discharge the obligation assumed by his acceptance. The difficulty in this case arises from the fact that the builders did not perform their contract with the defendant, nor did the plaintiff fully perform his contract with the builders, though perhaps the latter fact is not important except so far as it bears on the question of the amount which remained in the defendant's hands applicable to the last payment. The record discloses a state of facts not within the contemplation of the parties when the order which the plaintiff is seeking to enforce was accepted by the defendant. Some of these facts appear in the findings of the court; others are to be gathered from the undisputed testimony, though the learned trial judge refused to find them at the request of the defendant. By the terms of the contract between the defendant and the builders, the payments were to be made upon the certificate of the architect that performance

had been made to entitle the contractor to the particular payment. No such certificate was ever furnished, and there is no finding in the case that it was waived, or unnecessarily or improperly withheld. (*Wright v. Reusens*, 133 N. Y. 298; *Weeks v. O'Brien*, 141 id. 199.)

The builders never performed the contract and never completed the houses. It may be that there was a sufficient excuse for non-performance, but there is no finding on the subject and it is not apparent from the proofs. There was a clause in the building contract to the effect that in case they failed to complete the houses and furnish the necessary materials and labor for that purpose, then the defendant might do it and deduct the expense of completion from any sums unpaid upon the contract. The defendant did complete the houses under this provision of the contract; whether with or without the consent of the builders is not now very material. But the learned trial judge refused to find that the builders failed to perform their contract, and the amount expended by the defendant in completing the houses, which was a most important element in ascertaining what portion, if any, of the last payment, from which the order in suit was to be paid, ever became due to the contractors has not been found, though requests to that effect were made by the defendant, and proof had been given on that subject. We agree with the learned counsel for the plaintiff that the mere fact that the defendant completed the houses and the builders did not, does not necessarily affect the right of recovery upon the order. The defendant elected to complete the performance of the contract himself instead of insisting upon performance by the builders, and, therefore, any part of the contract price or of the last payment that remains in his hands, after deducting the expenses of completing the houses, is applicable to the payment of the plaintiff's claim, and under such circumstances the certificate of the architect would not be necessary to enable the builders or the plaintiff to recover the balance remaining in the defendant's hands. But the difficulty is that the learned trial judge apparently refused to go into these

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questions, or to find what the balance actually was, and it is not the province of an appellate court to attempt to spell out the facts from conflicting evidence. The learned-counsel for the plaintiff suggests that the last payment, from which the order in question was to be satisfied, had been depleted by the defendant by payments made to the builders in advance, after the acceptance of the order, and hence such payments should not be considered in determining the amount remaining in the defendant's hands applicable to the payment of the claim. But there is no finding that such payments were made as matter of fact, and the counsel's position in this respect is based upon inferences and arguments drawn from testimony quite uncertain and inconclusive. It is quite clear that this point was not brought to the attention of the trial court, nor developed at the trial in such a way as to render it available upon this appeal. It is not claimed that the plaintiff ever actually performed his contract with the builders by furnishing all the work and material embraced in it. The testimony is quite clear that he did not, and the fact is fairly to be implied from the findings. He did, however, furnish material for which he was never paid, amounting to a sum equal to the recovery in this case. It also appears that the builders or the defendant himself, after he had assumed the performance of the contract, were obliged to procure and pay for material which the plaintiff had contracted to furnish. What this amounted to is not found, and it is quite difficult to ascertain from the evidence.

The trial court has found in substance that performance on the part of the plaintiff was waived by the defendant, but there is no evidence in the case to warrant this conclusion. On the contrary, the testimony of the builders, which is not contradicted, is to the effect that they called upon him from time to time to furnish articles embraced in the contract, and that he failed to do so. But whether plaintiff's performance was entire or partial he could recover nothing more than the balance of the last payment remaining in defendant's hands. The testimony found in the record is, upon many material

points, exceedingly indistinct, and the actual facts are involved in much uncertainty and confusion. The findings are so general that none of the difficulties suggested have been eliminated from the case in the argument of this appeal. It is easy to see that the case was not tried upon any well-defined theory, and that the decision apparently proceeded upon the assumed equitable ground that as the plaintiff had furnished material that went into the houses, to the amount at least of one thousand dollars, for which he had not been paid, that the defendant was responsible for the same. The plaintiff was bound to show that an amount or portion of the contract price, which the defendant had stipulated to pay for the erection of the houses equal to his claim or to the recovery, still remained in his hands over and above what he had expended to complete them, and which was applicable to the payment of the order. The acceptance of the order by the defendant operated as an equitable assignment of so much of the last payment to the plaintiff, and the plaintiff's right could not be affected by payments made by the defendant in advance of the work or by the liens of mechanics or materialmen filed subsequent to the assignment. (*Lauer v. Dunn*, 115 N. Y. 405; *McCorkis v. Herrman*, 117 id. 297; *Stevens v. Ogden*, 130 id. 182; *Crouch v. Gutmann*, 134 id. 45.)

But unless that payment became due and payable by the defendant the plaintiff could not, under the circumstances disclosed by the record, recover upon the order as an absolute and unconditional promise. The plaintiff's right to recover the payment, or that part of it assigned to him by the order, was contingent upon performance of the contract so as to render the last installment or at least some part of it due and payable. The contract was not performed by the builders, but by the defendant himself, who was obliged to complete the houses. The assignment to the plaintiff was subject to any deduction which the defendant had a right to make from the payment on account of the reasonable and fair expense to him in completing the houses. He could claim payment of the order only from the balance, and what that was has not been found, and

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the testimony on this point is of such a character that at least different views may be entertained as to the amount, if anything, remaining in his hands. If the defendant did not retain the last payment as he agreed to do by his acceptance of the order, but paid it out to the builders in advance of the time when by the terms of the contract it became payable, or permitted it to be depleted or absorbed in some other way in violation of his obligations to the plaintiff, he would then be liable to make his acceptance good. There is no distinct finding on this subject. For these reasons we think there should be a new trial.

The judgment, therefore, should be reversed and a new trial granted, costs to abide the event.

All concur, except ANDREWS, Ch. J., not sitting.

Judgment reversed.

THOMAS HARVEY, Appellant, v. GILES S. BRISBIN et al.,
Respondents.

Plaintiff's complaint alleged in substance these facts: B. died leaving a will by which she directed her executors to sell her real estate when it seemed to them best, and hold the proceeds in trust to pay over the income to her daughters M. and F. during their lives, and upon the death of either, the principal of her share to go to her children. M. died leaving three children. At that time the power of sale had not been executed. Her children executed a conveyance to G., their father, for life, of "so much of the interest and income mentioned and provided for" in said will "as would come and accrue to said children under and by virtue of the provisions contained in said will." The interest of G. in said land was subsequently sold on execution against him. Thereafter the remaining executor, one of them having been removed, sold and conveyed the land and received the proceeds. The purchaser at the execution sale conveyed to plaintiff all his interest in the real estate, the income and the proceeds of the sale thereof. The plaintiff asked equitable relief. *Held*, that the complaint failed to state a cause of action; that said conveyance to G. did not purport to convey any interest in the land, but at most only an interest in the trust fund after the land had been converted into money, and if G. took an interest under it, it was simply a possible equity in the trust fund, and so he

had no legal title to which the lien of the judgment against him could attach, and the execution sale passed nothing to the purchaser; that the complaint was insufficient to reach any such equitable interest, as equitable assets only can be reached after the remedy by law is exhausted, the evidence of which is the return of an execution unsatisfied, and the complaint contained no such allegation; also, that plaintiff could not assert an interest in G. as tenant by the curtesy in his wife's land; that if, as to the land in question, she was seized at all, she took only a nominal fee which was subject to be and was defeated by the execution of the power of sale; also, that the right of a tenant by the curtesy is a legal right to be enforced against the claimant in possession, and so could not be enforced in this action as the purchaser under the sale by the executors was not a party.

Reported below, 50 Hun, 376.

(Argued June 11, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 7, 1888, which affirmed a judgment in favor of the defendants entered upon an order of Special Term overruling a demurrer by plaintiff to the answer directing judgment in favor of defendants and dismissing the complaint.

The nature of the action, and the facts, so far as material, are stated in the opinion.

E. F. Bullard for appellant. An equitable conversion is not an actual conversion. Until the latter had taken place the title was in Mrs. Brisbin and her children until 1876, when they conveyed to their father Giles, and it was subject thereafter to the lien of the judgments against him, and, hence, liable to be sold on execution as real estate. Mrs. Brisbin was dead in September, 1876, when the first suit was brought, and about July 24, 1876, after her death, her children became the owners of the legal estate in fee, subject only to be defeated by a sale by the executor under the power, and they then conveyed a life estate to their father, Giles S. Brisbin. (*Despard v. Churchill*, 53 N. Y. 199; Code Civ. Pro. §§ 1257, 3343; *Moncrief v. Ross*, 50 N. Y. 431.) As the

executor took no title under the will, nor the heir, the legal title and right of possession was necessarily vested in Mrs. Brisbin until her death, subject only to the power of sale. (*Wilson v. White*, 109 N. Y. 59.)

L. C. Pike and *C. A. Waldron* for respondents. If the complaint is demurrable, then it is unimportant whether or no the allegations of the answer are demurrable, for plaintiff would not be entitled to judgment even without an answer. He who commits the first error may not complain of like error. (*People v. Booth*, 32 N. Y. 397; *Noxon v. Bentley*, 7 How. Pr. 346; *Stoddard v. Onondaga Conference*, 12 Barb. 573; *A. & O. C. Co. v. Leitch*, 4 Den. 65.) Plaintiff's complaint does not set forth a cause of action against defendants. (*White v. Howard*, 46 N. Y. 144, 162; *Bogert v. Hertell*, 4 Hill, 492; *Stagg v. Jackson*, 1 N. Y. 206; *Moncrief v. Ross*, 50 id. 431; *Foster v. Banta*, 66 id. 468, 476; *Morse v. Morse*, 85 id. 53, 59; *Delafield v. Barlow*, 107 id. 535; *Ranson v. Miner*, 3 Sandf. 692.) The notice of appeal — treating it as an appeal from General Term — being only from the final judgment, and no reference being made to the interlocutory judgment or intermediate order theretofore entered, neither the order nor the case can be reviewed on this appeal; the interlocutory judgment or intermediate order as to all points covered thereby is to be taken as the settled law of the case, and is not open for review on the appeal. (Code Civ. Pro. §§ 1301, 1316; *Patterson v. McCunn*, 38 Hun, 531; *Dick v. Livingston*, 41 id. 455; *Reese v. Smith*, 95 N. Y. 645.) This court has not jurisdiction to hear this appeal, in the absence of certificate of General Term, because the judgment was interlocutory. (Code Civ. Pro. § 190, subd. 4; §§ 192, 1301, 1316.) This appeal cannot be taken because the amount involved is less than \$500; the General Term has made no order allowing the appeal, and the action is for income, and does not affect title to real property or an interest in lands. (Code Civ. Pro. § 191, subd. 3.)

FINCH, J. The complaint in this case in form demands equitable relief, but in fact is a disguised ejectment, seeking a recovery of land and the mesne rents and profits thereof. A demurrer was interposed to portions of the answer and has been defended, thus far successfully, by an attack upon the complaint as stating no cause of action. Its allegations furnish the facts with which we are to deal.

Mrs. Bailey died in 1871 leaving a last will and testament, in and by which she directed her executors to sell and convey her real estate at such time or times as seemed to them best and hold the proceeds in trust to pay over the annual income therefrom to her daughters, Matilda Brisbin and Fannie B. Haight, during their natural lives, and, upon the death of each, the principal of her share to go to her then living children. While there was no direct devise of the legal estate in the land to the executors, such an estate in them was essential to the trust, at least for the lives of the two daughters, and to enable the trustees to convert the land into money with which to constitute the trust fund, unless we adopt the only other possible construction, which is that the legal estate descended to the daughters subject to a trust power, the execution of which would divest that legal estate wholly and entirely and vest it in the purchaser buying under the power of sale. Giles Brisbin was the husband of the daughter Matilda. She died in 1876, leaving three children, but while the power of sale remained unexecuted. Soon after her death those children undertook to convey to their father, according to the statement in the complaint, "so much of the interest and income mentioned and provided for in the will of said Catherine S. Bailey as would otherwise come and accrue to said children of said Matilda under and by virtue of the provisions contained in said will for and during the period of the natural life of said Giles." The deed which made this transfer is not contained in the record, nor is the will, except as a copy of its tenth clause is recited in the General Term opinion. Whether we recur to that copy or tie ourselves to the allegations of the complaint, it is equally certain that

no interest or income of the trust fund was ever given to the children, at any time, either before or after their mother's death, but, on the contrary, that interest and income was given to the mother during her life, and on her death the principal of her moiety of the trust fund went to the children. Their deed did not purport to convey, and did not convey, to Giles any interest in the land, but only at the most, an interest in the trust fund after the land had become converted into money. The interest of Giles, if he took any at all under the instrument of transfer, was a possible equity in the trust fund and not a legal estate in the land. Upon a judgment against him obtained in 1879, his then interest in the land was sold on execution. But he had no legal estate upon which the lien of the judgment could attach on any theory of the will. If the fee went to the executors for the purposes of the trust, it never vested in Matilda or her children at all and could not pass from the latter to Giles. If it descended first to Matilda and then to her children, it was subject to and liable to be defeated by the execution of the power of sale, assuming that to have survived, which has been executed, and the entire legal estate been transferred to the purchaser. In either event the execution sale passed nothing to the purchasing creditor. If Giles took anything from his children it was at the best but an equity in the resultant trust fund. But the complaint alleges no such equity and is not sufficient to enable the creditor to pursue it. Equitable assets can only be reached after the remedy at law has been exhausted, the evidence of which is the return of an execution unsatisfied. There is no such allegation. It is not easy to comprehend what the pleader intended this complaint to be, but treating it with the utmost liberality it does not disclose a cause of action. It was suggested in the appellant's brief, though scarcely argued at the bar, that Giles was tenant by the curtesy of his wife's land. But on one theory of the will she was not seized at all, and on the other she took only the nominal fee subject with all its incidents to be defeated by the power of sale which has been executed with that effect. And, besides, as the General Term

suggest, the purchaser under that sale is not a party here and the right of the tenant by the curtesy is a legal right to be enforced against the claimant in possession.

What I have said is equally true if the trust as to Matilda's half ended at her death or the trust power as to that moiety became incapable of execution after that date, as the General Term opinion seems to indicate. That is one of the possible constructions. But in that event the legal estate in a moiety of the land devolved upon the children. They never conveyed that to Giles nor any part of it. They transferred only an interest in a supposed trust fund which never was constituted and never came into existence.

I have not sought to construe a will not put before us and do not determine what theory of it is correct. But, assuming all possible and suggested modes of interpretation, it is enough that none of them give the plaintiff a right which upon his complaint it is possible to enforce.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THE NEW YORK REAL ESTATE AND BUILDING IMPROVEMENT COMPANY, Appellant, v. THORNTON N. MOTLEY, Respondent.

A lease of a portion of a building in the city of New York contained a provision to the effect that if, without fault of the lessee, the demised premises shall be damaged by fire, the latter shall continue to pay rent "only for such portion of the leased premises as he can reasonably occupy during the time required to make the necessary repairs, but if the building shall be so damaged or destroyed as in the judgment of" the lessor to require to be rebuilt, then the lease shall terminate and the premises be vacated by the lessee. The building was so damaged by fire as to render it wholly untenable during the period of repair. In an action to recover rent alleged to have accrued after the fire, *held*, that the lease provided simply for two contingencies, one such a destruction of the building as to require it to be rebuilt, the other an injury by fire admitting a partial occupancy, neither of which happened; that, therefore, the emergency contemplated by the act of 1860 (Chap. 345, Laws

of 1860), and which did happen, *i. e.*, an injury by fire rendering the premises untenable, was not covered or provided for by the terms of the lease, and so, the statute applied and defendant was not liable.

Reported below, 8 Misc. Rep. 232.

(Argued June 11, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made April 10, 1893, which affirmed an order of the General Term of the City Court of New York, which affirmed a judgment in favor of defendant entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This was an action upon a lease under seal to recover rent of rooms. After the commencement of the term a fire occurred which did not totally destroy the building, but so damaged it as to render it wholly untenable during the period of repairs, and the tenant surrendered the premises.

The lease contained the following provision: "It is further agreed by and between the parties hereto that, if without fault, neglect or improper conduct of the party of the second part, his agents, servants or tenants, the premises hereby leased, or the building, shall be damaged by fire, the elements, or otherwise, the party of the second part shall continue to pay rent only for such portion of the leased premises as he can reasonably occupy during the time required to make the necessary repairs, but, if the building shall be so damaged or destroyed as, in the judgment of the parties of the first part, to require to be rebuilt, then from the time of the happening of said events, or either of them, this lease and the term hereof shall wholly end and determine, and the premises be vacated and fully surrendered, and the rent shall be paid up to such time."

Plaintiff sought to recover rent claimed to have accrued after the repairs were completed. The parties stipulated that the fire was not caused by the fault of either.

N. B. Sanborn for appellant. In order to exclude the application of the statute of 1860, it is not necessary that there

should be an agreement or covenant in express words that the tenant is to continue to pay rent, or that the lease shall continue, notwithstanding the destruction of the demised premises, or such injury as renders them untenable. The statute only requires that there shall be an express agreement, as contradistinguished from one only implied, and that it shall be in writing, and shall be clearly shown on the face of the lease or other written agreement. (*Butler v. Kidder*, 87 N. Y. 98.) This court will be largely governed by the construction which the parties by their conduct have put upon the agreement. (*Chicago v. Sheldon*, 9 Wall. 50, 54; *Topliff v. Topliff*, 122 U. S. 121, 131; *French v. Pearce*, 8 Conn. 439; *Farrar v. Rowley*, 2 La. Ann. 475; *D'Aquin v. Barbour*, 4 id. 441; *Onthank v. L. S., etc., R. R. Co.*, 71 N. Y. 194, 197; *Jennison v. Walker*, 11 Gray, 423; Bishop on Cont. § 598.)

David Leventritt for respondent. The appeal should be dismissed, as no appeal lies to this court from an order of the court below affirming a judgment. (Code Civ. Pro. § 3194; *A. B. & C. Co. v. Comer*, 98 N. Y. 574; *Bieling v. City of Brooklyn*, 12 id. 99; *Hollister Bank v. Vail*, 15 id. 593; *Phipps v. Van Cott*, 4 Abb. Pr. 90; *Lee v. Ainslee*, Id. 463; *Ford v. Daniel*, 3 id. 385; *Bentley v. Jones*, 4 How. Pr. 355; *Jones v. Miller*, 19 Barb. 196; *Laurence v. F. L. & T. Co.*, 15 How. Pr. 57; Code Civ. Pro. §§ 1345, 1355, 3061, 3194.) The lessee of rooms, lofts or apartments in a building rendered untenable, but not destroyed by fire, is within the protection of the statute of 1860. (*Graves v. Berdan*, 29 Barb. 100; 26 N. Y. 498; *S. Bank v. Boston*, 118 Mass. 125; *Winton v. Cornish*, 5 Ohio, 477; 1 Washb. Real. Prop. [5th ed.] 577, 578; *Tallman v. Murphy*, 120 N. Y. 345; *Butler v. Kidder*, 87 id. 98; *Vann v. Rouse*, 94 id. 401, 404.) The lease does not waive the protection of the statute. (*Butler v. Kidder*, 87 N. Y. 103.) A provision for the apportionment of rent in the event of a partial occupancy cannot be construed as a waiver of the benefits of the act of 1860. (*Vann v. Rouse*, 94 N. Y. 401.) The tenant is enti-

tled to a reasonable time after the premises have become untenable within which to remove his property, and what is a reasonable time is a question that should be submitted to the jury. (*Zimmer v. Black*, 14 N. Y. Supp. 107; *Bassett v. Dean*, 34 Hun, 250; *Wallace v. Coe*, 13 N. Y. S. R. 546; *Fleischman v. Topfritz*, 31 N. E. Rep. 1089.)

FINCH, J. Nothing would need to be added to the very satisfactory opinion of the General Term in this case were it not for the elaborate criticism to which it has been subjected in the argument of the appellant. The question was whether the emergency contemplated by the act of 1860 (Chap. 345), which is an injury by fire making the premises untenable, was covered and provided for by the terms of the lease between the parties, and for that reason taken out of the scope and operation of the statute. The lease does provide expressly for two contingencies. One of them is such a destruction of the building as requires it to be re-built, in which event all rent ceases and the lease terminates. The other is an injury by fire which admits of a partial occupancy, in which event the accruing rent is to be measured by the proportion of available occupancy. But what occurred was something different from either described contingency. The fire did not compel a re-building on the one hand, nor did it leave a partial occupancy which would carry some part of the rent with it, but the premises demised became wholly untenable. As Judge PRYOR tersely states it: "A stipulation for a proportional payment for a partial occupancy is clearly no provision for an event which prevents any and all occupancy." To that proposition the appellant objects, and insists that a fair construction of the lease provides for a suspension of the rent while the premises are untenable, and founds his argument upon an inference derived from the use of the word "only" in the sentence which reads "shall continue to pay rent *only* for such portion of the leased premises as he can reasonably occupy during the time required to make the necessary repairs." His argument is that if no proportion of the prem-

ises is tenantable then none of the rent is payable during the period of repairs, but revives when that period ends; that is to say, out of a provision which contemplates no removal but only an inconvenience, a stipulation is evolved which requires a removal during the period of repairs, and then a removal back after they are finished. If so onerous a burden had been in terms proposed it is quite probable that the lease would have been refused. Any removal is a serious injury to the business man, and to double it is an evil he would naturally avoid. The statute on the one hand and the re-building clause in this lease both contemplate that where the tenant, by reason of fire, is obliged to remove from the premises because they have become wholly untenable he shall not be obliged to return at some unknown and indeterminate period measured by the landlord's completion of his repairs, and it would be a very unjust, and, I think, unreasonable construction, that a stipulation for lessening the rent where no removal was necessary should inferentially be extended to one in which a removal was inevitable.

I think, therefore, that the case was correctly decided, and the judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

148 160
149 298
149 555

HELEN C. BEARDSLEE et al., Appellants, v. HENRY A. DOLGE,
Respondent.

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148 160
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Where an individual sustains an injury by misfeasance or non-feasance of a public officer, an action lies in favor of the former against the latter. A commissioner of highways is not a judicial officer in the sense that he is entitled to the common-law protection against a civil action for misconduct in office.

In laying out a highway said commissioners exercise a special and limited jurisdiction, and while it may be presumed, until the contrary appears, that they acted legally, their acts may be impeached by showing that they exceeded their powers.

An official determination of a commissioner as to a fact upon which his power to act depends is not conclusive, and if the fact does not exist, his decision will not establish jurisdiction.

N. Y. Rep.]

Statement of case.

Where there is a want of authority in a public officer to hear and determine the subject-matter of a controversy, an adjudication upon the merits is a nullity, and does not estop even an assenting party.

A commissioner of highways, in making a return to a writ of certiorari brought to review his proceedings, acts as a ministerial officer, and where in his return he makes material false statements, an action lies against him in favor of a party injured.

A writ of certiorari to review the proceedings of defendant, a commissioner of highways, in locating a highway as altered, which the relator claimed was laid out through his barnyard, commanded the defendant to certify and return his proceedings "with all things pertaining thereto." In his return to the writ, defendant stated that "none of said alteration and highway proposed passes through" said barnyard. The proceedings were affirmed on the ground that the language of the return was an answer to the claim that the highway ran through said barnyard. *Held*, that the relators were not estopped by the decision, but were entitled to show, in an action to recover damages, that the highway as proposed did run through their barnyard; and so, that the return in this respect was false, and defendant acted without jurisdiction.

(Submitted June 11, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 25, 1893, which affirmed a judgment in favor of plaintiff entered upon an order dismissing the complaint on trial at Circuit.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles E. Snyder for appellants. The facts stated in the offers of proof must be deemed to be true. (*McNally v. P. Ins. Co.*, 137 N. Y. 389; *Rehberg v. Mayor, etc.*, 91 id. 137.) The defendant is liable for his false return. (*Bryant v. Town of Randolph*, 133 N. Y. 70; *Hover v. Barkhoff*, 44 id. 113; *Clark v. Miller*, 47 Barb. 38; 54 N. Y. 528; *Wilson v. Mayor, etc.*, 1 Den. 595, 599; *Rector v. Clark*, 78 N. Y. 21; *McDonnell v. Buffum*, 31 How. Pr. 154; *Houghton v. Stewart*, 1 Den. 589; *Brooks v. St. John*, 25 Hun, 540; *Cunningham v. Bucklin*, 8 Cow. 178.) The defendant does not have the immunity of a judicial officer. (*People ex rel. v. Bd. of Health*, 140 N. Y. 1; *People v. Wheeler*,

21 id. 82; *Ex parte Clapper*, 3 Hill, 458; *M. & H. R. R. Co. v. Archer*, 6 Paige, 83; *A. & N. R. R. Co. v. Brownell*, 24 N. Y. 345; *P. P., etc., R. R. Co. v. Williamson*, 91 id. 552; *Dorn v. Backer*, 61 id. 261.) The decision of the Supreme Court and of the Court of Appeals in the certiorari proceeding affirming the order of the commissioner of highways is no defense to this action. (*Rector v. Clark*, 78 N. Y. 21; *Collins v. Hydorn*, 135 id. 320; *C. C. Bank v. Judson*, 8 id. 254; *Ferguson v. Crawford*, 70 id. 253; *Harrington v. People*, 6 Barb. 607; *Mandeville v. Reynolds*, 68 N. Y. 528; *Krekeler v. Ritter*, 62 id. 372.) The General Term erred in construing the return. (*People ex rel. v. Beardslee*, 45 Hun, 310.) The General Term erred in holding that it was manifest that the General Term and Court of Appeals must have reached the same conclusion if the portion under consideration had not been inserted therein. (*People ex rel. v. Comrs., etc.*, 13 Wend. 310.) An action for a false return is a proper remedy. (*People ex rel. v. Mayor, etc.*, 6 Hun, 652; *People ex rel. v. Campbell*, 18 J. & S. 82.) The complaint is in proper form. (*Rector v. Clark*, 78 N. Y. 21; *Brooks v. St. John*, 25 Hun, 540.)

Edward A. Brown for respondent. The hearing must be upon the writ and return. (38 Hun, 43; *People ex rel. v. McCarthy*, 102 N. Y. 643.) There is nothing in the return, aside from the actual proceedings, truly, honestly and correctly returned, pursuant to the requirements of the writ, showing that the road did not run through any yard of the appellants. If there is or can be construed as such, then it was irrelevant and must be disregarded. (*Stone v. Mayor, etc.*, 25 Wend. 168; *People ex rel. v. Mayor, etc.*, 2 Hill, 9; *People ex rel. v. Schillinger*, 32 N. Y. S. R. 354.) The commissioner, this defendant, after an inspection of the premises, held that the proposed road did not pass through the barnyards of the Beardslees. Therefore, the plaintiffs cannot recover. (*Ford v. Smith*, 1 Wend. 48; *Millan v. Jenkins*, 9 id. 298; *Rector v. Clark*, 12 Hun, 198; 78 N. Y. 21.)

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

BARTLETT, J. This is an appeal from the General Term, fourth department, affirming a non-suit at Circuit.

This action is brought to recover damages for a false return to a writ of certiorari made by the defendant when acting as highway commissioner of the town of Manheim, Herkimer county. The plaintiffs claim that the defendant, as such highway commissioner, made an order, without jurisdiction, locating a highway, as altered, through their barnyard, the center line being twenty-five feet from the barn. The plaintiffs applied for a writ of certiorari on the ground that it appeared "upon the face of said proceedings" that the highway was located through their barnyard. The writ issued commanding the defendant to return the proceedings with all things appertaining thereto. The defendant, as such highway commissioner, made return to the writ, attaching thereto all the proceedings in altering and locating the highway, and stating "that none of said alteration and highway proposed passes through the buildings or barnyard of Helen C. Beardslee and Guy R. Beardslee, nor do they pass through any yards of the said Beardslees."

The General Term affirmed the proceedings (45 Hun, 310) and this court affirmed without an opinion (110 N. Y. 680). This disposition of the proceeding was due to the fact that the language of the return, already quoted, was held an answer to plaintiffs' contention that the highway ran through their barnyard. The hearing was upon the writ and the return, the appellate courts holding the latter conclusive. The plaintiffs subsequently obtained a perpetual injunction against defendant's successor in office prohibiting the opening of the highway. Later this action to recover damages for the false return was brought and two trials have been had. At the first trial the plaintiffs recovered a verdict, but the General Term reversed the judgment. At the second trial plaintiffs were non-suited; the General Term affirmed the judgment and the present appeal was taken.

At the last trial the plaintiffs offered to prove that the statement in the return that the highway did not pass through

their barnyard was not true, and that they were damaged in the amount stated in the complaint. The court refused to receive the evidence, and, for the purposes of this appeal, the facts stated in the offer of proof must be taken as true. (*Rehberg v. The Mayor*, 91 N. Y. 137-141; *McNally v. Phoenix Ins. Co.*, 137 id. 389.)

The learned General Term seems to have proceeded upon the theory that the certiorari proceeding was final, determined the rights of all parties, and that the adjudication cannot be attacked collaterally in this action. This court, having heard the certiorari proceeding on the writ and return, and having no authority to look into the facts, made a proper disposition of the matter upon the record as it then stood, but there is nothing in the decision of that appeal which prevents the plaintiffs from showing that the defendant, as a highway commissioner, acted without jurisdiction and made a false return when he stated that the proposed highway did not run through the barnyard of the plaintiffs. Highway commissioners, in laying out a highway, exercise a special and limited jurisdiction, and although it may be presumed, until the contrary appears, that they have acted legally, it is quite clear their acts may be impeached by showing that they exceeded their powers. (*Ex parte Clapper*, 3 Hill, 460; *Cagwin v. Town of Hancock*, 84 N. Y. 532.) Without the consent of the owner no road can be laid out "through any buildings, or any fixtures or erection for the purposes of trade or manufactures, or any yards or enclosures necessary for the use and enjoyment thereof." (1 R. S. 514, § 57; *Id.* [8th ed.] p. 1372, § 57.) The statute expressly deprives the commissioners of jurisdiction where the road passes through a yard, and provides for a proceeding before the county judge to be confirmed by the General Term of the Supreme Court.

It has been held that commissioners laying out a highway through a yard, etc., were liable to the owner in trespass. (*Clark v. Phelps*, 4 Cow. 190.) This case proceeds upon the theory that commissioners acted wholly without jurisdiction. (*The People v. Goodwin*, 5 N. Y. 571.) A commissioner of

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

highways is not a judicial officer in the sense that he is entitled to the common-law protection against a civil action for his misconduct in office. (*People v. Wheeler*, 21 N. Y. 82.) When called upon to make his return to the writ of certiorari he acts as a ministerial officer. It is an established rule in this state that where an individual sustains an injury by misfeasance or non-feasance of a public officer, who acts contrary to, or omits to act in accordance with, his duty, an action lies against such officer by the party injured. (*Bryant v. Town of Randolph*, 133 N. Y. 75; *Adsit v. Brady*, 4 Hill, 630; *Houghton v. Swarthout*, 1 Den. 589; *Hover v. Barkhoof*, 44 N. Y. 113; *Clark v. Miller*, 54 id. 528; *Wilson v. The Mayor*, 1 Den. 595, 599; *Rex v. Lyme Regis*, 1 Doug. 149; *Rector v. Clark*, 78 N. Y. 21.)

The official determination of the defendant as to the fact upon which his power to act depended is not conclusive, and if the fact does not exist his decision that it did does not establish jurisdiction. (*Matter of N. Y. Catholic Protectory*, 77 N. Y. 342; *Dorn v. Backer*, 61 id. 261.) Where there is a want of authority to hear and determine the subject-matter of the controversy an adjudication upon the merits is a nullity, and does not estop even an assenting party. (*Matter Will of Walker*, 136 N. Y. 20-29.)

The present action is in the nature of a collateral attack upon the proceedings of the defendant as highway commissioner for want of jurisdiction. Such an attack can be made upon any judgment where there is no jurisdiction. (*Ferguson v. Crawford*, 70 N. Y. 253; *Chemung Canal Bank v. Judson*, 8 id. 254; Freeman on Judgments, § 120.)

If the plaintiffs shall succeed in proving their case the proceedings must be held void and the return to the writ of certiorari not true.

It is not necessary to impute corrupt motives to defendant; a mistake as to his duty and honest intentions on his part would still leave him liable. (*Houghton v. Swarthout*, 1 Den. 589; *Amy v. The Supervisors*, 11 Wall. 136.)

It is argued by the appellants here that the decision in the

certiorari proceeding would have been the other way if the defendant had not stated in his return that the highway did not pass through the barnyard of plaintiffs, as the return showed that the center line of the highway three rods wide was twenty-five feet from plaintiffs' barn and would carry the outer line to within three inches of it. On the other hand, the General Term suggested that the statement of defendant in his return, that the highway did not run through the barnyard of plaintiffs, might be regarded as nothing more than a declaration that in the proceeding before him, as commissioner, he held that the contemplated highway did not run through the barnyard; or, if it could not bear this construction, it was irrelevant and should be disregarded.

We do not think this statement in the return can be treated as irrelevant as it appears to have exercised a controlling effect in the determination of the certiorari proceeding. The General Term, writing in that proceeding, say: "The relators further claim that the action of the commissioner should be reversed, because the proposed road runs through the barnyard of the relators. The language of the return is an answer to such claim. It says, 'That none of said alteration and highway passes through the buildings or barnyard of the relators, nor do they pass through any yard of the said Beardsees.'" (45 Hun, 312.)

The respondent has referred us to cases holding that a common-law certiorari to an inferior tribunal removes only the record, and if the return contains anything more it will be disregarded *pro tanto*.

This rule of the common law which treated the writ of certiorari as analogous to a writ of error, has no application to our present statutory proceeding where the writ of certiorari cannot issue to review a determination in a civil action or special proceeding by a court of record, or a judge of a court of record. (Code, § 2121.) The office of the writ is to compel the body or officer whose proceedings are under review to make a return of the proceedings, and a statement of the other matters specified in and required by the writ. (Code,

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Statement of case.

§ 2134.) The Code of Civil Procedure, in providing what questions are to be determined upon the return of the writ, names first, jurisdiction of the subject-matter. (§ 2140.)

In the matter at bar the writ in the certiorari proceeding commanded the defendant to certify and return his proceedings "with all things appertaining thereto," and we are of opinion that his declaration in the return, that the highway did not pass through the barnyard, was material and made in obedience to the writ, exercised a controlling influence in that proceeding, and he is liable in this action, if, after due trial of the issues, it proves to have been false and the plaintiffs damaged thereby.

The judgment should be reversed, with costs to abide the event.

All concur, except ANDREWS, Ch. J., not sitting.

Judgment reversed. _____

WILLIAM H. WALKER, Respondent, v. AMERICAN CENTRAL
INSURANCE COMPANY, St. Louis, Appellant.

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| 143 | 167 |
| 166 | 254 |

In an action upon a policy of fire insurance the complaint alleged the issuing of the policy, which by its terms insured the property for a term beginning February 1, 1891; and that the property was destroyed by fire. The answer set up as a counterclaim that the policy was issued by mistake; that the agreement of the parties and the intention was to renew another policy, which expired February 17, 1891, the renewal not to take effect until the expiration of the original policy. Defendant asked that the policy be reformed so as to take effect only from February seventeenth. No reply was served. On the trial defendant claimed that to put in issue the facts stated as a counterclaim a reply was necessary, and, in the absence of one, they were admitted. *Held*, untenable; that the alleged counterclaim was not such, but only a defense, as it simply amounted to a denial of the making of the contract alleged, or of any liability thereon; that it could not be turned into an equitable counterclaim by asking a reformation of the contract; that any such relief was needless, as proof of the facts pleaded would disprove and defeat plaintiff's claim.

To constitute a counterclaim, the facts stated must amount to an independent cause of action; when they serve merely to defeat plaintiff's cause of action, they amount to a defense, not a counterclaim.

(Argued June 12, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 15, 1893, which affirmed a judgment in favor of defendants entered upon a verdict.

This was an action upon a policy of fire insurance issued by defendant.

The complaint set up the issuing of the policy on February 1, 1891, insuring the property from that time for one year; that the property insured was damaged by fire to the full amount of insurance on February 6, 1891; that due proofs of loss were furnished and judgment for the amount of the policy was demanded and refused. Defendant's answer admitted the destruction by fire of the property insured on the day specified, and the issuance of the policy, but denied that the proofs of loss furnished were in accordance with the terms of the policy and all other allegations of the complaint except those admitted, and set up as a counterclaim that the policy in suit was issued by mistake; that it was in fact intended as a renewal of another policy issued by defendant on the same property expiring February 17, 1891, and was issued under an agreement between plaintiff and defendant's agent for such renewal, but by mistake was made to take effect February 1, 1891, although it was not intended it should take effect until February 17, 1891, and judgment was demanded that the complaint be dismissed. A further affirmative judgment was also demanded that the policy in suit be so reformed that the risk mentioned in it should take effect February 17 instead of February 1, 1891, and that the court adjudge it to be a renewal of the policy expiring February 17, 1891, and not as an additional insurance. No reply was served. Upon the trial the court held that the matter set up by defendant in his answer as a counterclaim did not constitute one and that no reply was necessary.

Further facts are stated in the opinion.

Edward A. Washburn for appellant. The fourth defense set up in the answer constitutes a counterclaim as defined by

N. Y. Rep.]

Opinion of the Court, per FINCH, J.

section 501 of the Code of Civil Procedure. (*Boston Mills v. Eull*, 6 Abb. Pr. [N. S.] 322; 37 How. Pr. 301; *Gleason v. Moen*, 2 Duer, 642; *Currie v. Cowles*, 6 Bosw. 453; *Moser v. Cochrane*, 107 N. Y. 35-38; *Leavenworth v. Packer*, 52 Barb. 132-136.) The practice on the part of the defendant at the trial was proper, and sufficient to protect its rights arising on the failure of the plaintiff to serve a reply. (Code Civ. Pro. § 522; *Clinton v. Eddy*, 1 Lans. 61.) The counterclaim in this action is based upon the theory that there was no mistake as to the terms of the agreement, but that through the mistake of the agent in reducing the policy to writing, the policy as to the time that it shall commence does not express the agreement actually made. (*Boen v. Schrenkeiser*, 100 N. Y. 55; *Pitcher v. Hennessy*, 48 id. 415; *Maher v. H. Ins. Co.*, 67 id. 283; *Devereux v. S. F. Ins. Co.*, 51 Hun, 147; Code Civ. Pro. § 974; *Mackellar v. Rogers*, 109 N. Y. 468.)

E. A. Nash for respondent. The facts set up in defendant's fourth answer do not constitute a counterclaim. (*Juliard v. Chaffee*, 92 N. Y. 529; *Benton v. Martin*, 52 id. 570.) The exceptions to the evidence that the plaintiff agreed with Callan, the agent, who wrote the first policy, to let him renew the insurance, are not well taken. (*Blackburn v. Weisgerber*, 13 Wkly. Dig. 263; *People v. Bragle*, 10 Abb. [N. C.] 300, 303-335; *Nichols v. Van Valkenburgh*, 15 Hun, 230.)

FINCH, J. What is pleaded in the defendant's answer as a counterclaim, and asserted to have become conclusive because no reply was served, is, in our judgment, simply and only a defense. Facts pleaded which controvert the plaintiff's claim and serve merely to defeat it as a cause of action are inconsistent with the legal idea of a counterclaim, which is a separate and distinct cause of action, balancing in whole or in part that proved by the plaintiff. (*Prouty v. Eaton*, 41 Barb. 409.) It meets the latter, not only by a denial of it, or an attack upon its existence, but by opposing to it an equal or over-balancing demand on the part of the defendant. In this case what is averred to be an

equitable counterclaim is in its legal effect an allegation that plaintiff's cause of action never in fact existed; that the seeming evidence of it was the product of a mistake and not the true record of the contract; and that the risk of a second insurance for one thousand dollars for which the action was brought was never in fact taken or assumed by the defendant company. In brief, the answer denied the making of the contract alleged, or any liability upon it. Of course, if true, that was a complete defense, and nothing but a defense, and could not be turned into an equitable counterclaim by asking a reformation of the writing. Any such relief was needless and of no possible consequence. When the facts pleaded should be proved their inevitable first effect would be to disprove and defeat the plaintiff's claim, and that result would furnish a remedy complete and perfect, and leave the defendant in a position of entire safety and needing for the protection of its rights no further or other judgment or relief. For the reformation sought would turn the policy sued upon only into an agreed renewal of a policy already matured and settled. There was nothing left upon which such a renewal could operate. The property had been burned: the loss had been paid: and the policy which covered it was dead. It could not be effectively renewed, and if renewed in form would be lifeless and worthless in fact. So that, beyond defeating the plaintiff's claim, the defendant had no right which at all needed a further affirmative judgment, and no such judgment could be ever a practical possibility.

That fact is an insuperable difficulty in the way of regarding this plea as a counterclaim. To be such it must amount to an independent cause of action which the defendant company, if it had not been sued, might have enforced as plaintiff. Assume, therefore, that this suit had not been brought, but that the company had sued in equity upon the pleaded facts to reform the policy. There would have been no equitable cause of action because the remedy at law would be adequate and no necessity or ground for equitable interference would be disclosed. The company could show no right

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dependent upon an affirmative renewal of the old policy, for that was already paid and canceled and could not be renewed, and would be wholly nugatory and worthless if its formal existence should be prolonged. The only possible relief would be to cancel and extinguish the second policy issued by mistake. But a defense against that at law as never having been a contract made, as having no legal existence, would be always available against any possible claimant, and no ground for the intervention of equity would appear. The case would be like *Geer v. Kissam* (3 Edw. Ch. 129), in which the equitable relief sought was the cancellation of an over-due note, and in which it was held that the action could not be maintained. The defense at law was perfect and fully adequate. Equally so it would be perfect in the case I am supposing, and not only so but the equitable remedy of a reformation would be both superfluous and impossible; superfluous because needless for any purpose, and impossible since the contract as reformed had already been finally executed. The policy existing by mistake could not be valid in any hands: by the fire it had matured and ceased to be a continuing liability under which new rights could accrue: it represented only an existing right of action at law: and was altogether open to the defense that the policy was a mistake and not a contract for the added insurance claimed.

The defense, therefore, was not a counterclaim and no reply was needed, but the objection to the plea in the aspect asserted could be taken at the trial. It was so taken, and the court ruled in accordance with the contention. Nevertheless, the facts pleaded constituted a legal defense, and put in issue the very existence of the contract sued upon. Whether or not there was an actual agreement for the new and added insurance became a question for the jury, which was fought out at the trial and submitted for decision. There was no error in the ruling made.

The judgment should be affirmed, with costs.

All concur, except ANDREWS, Ch. J., not sitting.

Judgment affirmed.

MARY FISKE PAGET et al., Respondents, v. CHARLES G. STEVENS, as Trustee, etc., Appellant, et al., Respondents.

Under the provisions of the Code of Civil Procedure, providing for the service of a summons by publication upon a defendant out of the state (§§ 438, 439), which require that the order directing such a service shall be founded upon a verified complaint showing a sufficient cause of action against a defendant to be served, it is not sufficient that the complaint sets forth facts sufficient to constitute a cause of action; the cause of action must be one of which the court can take cognizance.

An action to remove testamentary trustees, holding title to real estate under the trust, is a purely personal action, having no connection with the title, within the meaning of the provision of said Code (Subd. 1, § 263), giving to superior city courts jurisdiction in an action to procure a judgment affecting an estate or interest in real property or a chattel real.

The provision of said Code (Subd. 1, § 263), giving to said courts jurisdiction of an action "brought by a resident of the city wherein the court is located against a natural person who is not a resident of the state," includes cases where a sole plaintiff or all of the plaintiffs are residents of the city; it does not give jurisdiction where one of two or more plaintiffs, who is not merely a formal, but an interested party is a non-resident.

An action was brought in the Court of Common Pleas in and for the city and county of New York to remove two trustees of a trust created under a will, one of whom is and was at the commencement of the action and during the time mentioned in the complaint a resident of Massachusetts, and none of the acts complained of were done in this state. One of the plaintiffs, also a trustee, resides in the city of New York; the other plaintiff, a *cestui que trust*, resides in England. An order was made for the service of the summons on said non-resident trustee by publication. On motion to vacate the order, *held*, that said court had no jurisdiction, and so, that the order ought to have been vacated.

(Argued June 19, 1894; decided October 9, 1894.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made May 7, 1894, which affirmed an order of Special Term denying a motion by the defendant Charles G. Stevens to vacate and set aside an order of publication.

This action was brought for the removal of John L. Melcher and Charles G. Stevens, as trustees under the will of Paran Stevens, deceased.

The defendant Charles G. Stevens being at the time of the commencement of the action a resident of the state of Massachusetts, an order for service of the summons upon him by publication was obtained, which he moved to vacate.

The further facts, so far as material, are stated in the opinion.

George Zabriskie for appellant. The order for publication must be founded upon a verified complaint showing a sufficient cause of action against the defendant to be served and proof by affidavit of the additional facts required by the Code. The phrase, "sufficient cause of action," means a valid claim against the defendant, and one of which the court can take cognizance without personal service of process within its jurisdiction upon the defendant. (*Bryan v. U. P. Co.*, 112 N. Y. 382-386; Code Civ. Pro. § 439.) The jurisdiction of the Court of Common Pleas cannot be maintained under subdivision 1 of section 263, because this is not an action "to recover or procure a judgment establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property or a chattel real." (*McClusky v. Cromwell*, 11 N. Y. 593, 601; *People v. Woodruff*, 32 id. 355, 364; *People v. Wemple*, 115 id. 302, 307; *Carpenter v. Strange*, 141 U. S. 87; *Massie v. Watts*, 6 Cranch, 148; *Gardner v. Ogden*, 22 N. Y. 327; *K. L. Ins. Co. v. Clark*, 22 Hun, 506; *Y. C. N. Bank v. Blake*, 43 id. 162; *Becker v. Town of Cherry Creek*, 70 id. 6; *Remer v. McKay*, 54 Fed. Rep. 432; *Kirk v. Kirk*, 137 N. Y. 510; *Douglass v. Cruger*, 80 id. 15; *Jones v. Jones*, 108 id. 415.) The jurisdiction of the Court of Common Pleas cannot be supported on the theory that the cause of action arose within the city of New York; because the cause of action arose in Massachusetts, where the defendant resides, and where the land is situated in respect of which the alleged breach of duty has been committed. (*Garner v. H. Mills*, 6 Abb. [N. C.] 212, 218, 219; *Lattin v. McCarty*, 41 N. Y. 107; *Leary v. Melcher*, 14 N. Y. Supp. 689; *Walters v. C. Ins. Co.*, 5 Hun, 343; *P. N. Bank v. Taylor*, 60 id. 130;

People v. Tweed, 53 N. Y. 194; *Landers v. S. I. F. Co.*, Id. 450; *Hoag v. Lamont*, 60 id. 96; *Pennoyer v. Neff*, 95 U. S. 714, 727.) The criticism of the learned judges at Special Term and General Term, to the effect that, if defendant's objections to the jurisdiction of the Court of Common Pleas are well founded, neither the Supreme Court of this state nor the courts of Massachusetts or Rhode Island can acquire jurisdiction, is based upon a misapprehension of the situation. (*Gardner v. Ogden*, 22 N. Y. 327; *Gibson v. A. L. & T. Co.*, 58 Hun, 449.) The question of jurisdiction is properly raised by motion to vacate the order of publication. (*Von Hesse v. Mackaye*, 55 Hun, 365; *Bryan v. U. P. Co.*, 112 N. Y. 439.)

Frederick P. Delafield for respondents. The situs of the property determines the jurisdiction of the court, irrespective of parties, and the court has, therefore, indisputable jurisdiction over so much of this action as affects the lands situate in the city and county of New York. (Code Civ. Pro. §§ 263-265; *Arndt v. Griggs*, 134 U. S. 316; *Acker v. Leland*, 96 N. Y. 383; *Quackenboss v. Southwick*, 41 id. 117; *Nichols v. Romaine*, 9 How. Pr. 512; *Eitel v. Brackin*, 6 J. & S. 9; *Christy v. Libby*, 2 Daly, 418; *Alexander v. Bennett*, 60 N. Y. 204.) The Court of Common Pleas has unlimited equity jurisdiction. (*Carey v. Carey*, 2 Daly, 424; *Townsend v. M. S. & S. S. D. Co.*, 15 N. Y. 587; *Langdon v. Astor*, Id. 9; *Wheeler v. Newbould*, 16 id. 392; *Dunham v. Waterman*, 17 id. 9; *Bennett v. Van Syckel*, 18 id. 481; *Hoyt v. Thompson*, 19 id. 207.) The defendant's claim of exclusive jurisdiction for the Supreme Court in an action of this kind is untenable. (*Burckle v. Eckhart*, 3 N. Y. 132; *Garner v. Harmony Mills*, 13 J. & S. 148; *Brown v. Brown*, 1 Barb. Ch. 189; *Becknell v. Field*, 8 Paige, 443; *Genet v. D. & H. C. Co.*, 113 N. Y. 472; *Sherman v. Felt*, 2 id. 186.) A sufficient cause of action is stated in the complaint. (*Quackenboss v. Southwick*, 41 N. Y. 117; *Deraismes v. Dunham*, 22 Hun, 86; *In re Morgan*, 68 N. Y. 618.)

N. Y. Rep.] Opinion of the Court, per PECKHAM, J.

PECKHAM, J. The plaintiff Mary Fiske Paget is one of three children which the late Paran Stevens left him surviving at his death in 1872. The plaintiff Marietta R. Stevens is his widow. The defendants Charles G. Stevens and John L. Melcher are two of the three trustees appointed by the deceased in the twelfth clause of his will, the plaintiff Mrs. Stevens being the third.

The trust created in that clause was in favor of the plaintiff Mrs. Paget, and consisted of one-third of the remainder of the estate of the deceased, after the payment of all debts, specific bequests and legacies, and payments to trustees of trusts otherwise created. The income from this one-third is by the terms of the will to be paid by the trustees to the plaintiff Mrs. Paget during her lifetime, and upon her decease the principal is to be paid to her children.

Similar trusts in favor of his two other children were created by the eleventh and thirteenth clauses of the will. One of the other children married the defendant John L. Melcher, and the third child, a son, died unmarried and without issue, and by the terms of the will such share went in equal parts to the plaintiff Mrs. Paget, and the defendant Mrs. Melcher.

The plaintiffs have commenced this action to remove the two defendants Charles G. Stevens and John L. Melcher from their positions as trustees of Mrs. Paget under the twelfth clause of the will of the deceased Stevens.

Mrs. Marietta R. Stevens resides in the state of New York, and the plaintiff Mrs. Paget is a married woman, residing with her husband in the city of London, England. The defendant John L. Melcher is a resident of this state, and the defendant Charles G. Stevens is, and was at the time of the commencement of this action, a resident of Massachusetts.

There has been conveyed to the trustees of the three respective trusts above mentioned, certain real estate in Massachusetts, while the real estate in New York, other than such as has been conveyed to the trustees for Mrs. Stevens, the widow, is in the actual possession of the executors and executrix of the will of the deceased Stevens, and has not been sold

or divided between those entitled thereto, among whom are the two children of the deceased.

The grounds for seeking the removal of the two defendant trustees of the plaintiff Mrs. Paget are set forth in the complaint, which alleges that they have practically ousted the third trustee (the plaintiff Mrs. Stevens) from the exercise of any authority created by the trust, and have failed to co-operate with or consult her in the management of such trust, and have received the income of the Boston property, kept the accounts thereof and disposed of the same without her knowledge or consent. It is also stated that the trustees under the eleventh clause of the will (in favor of the daughter of Mrs. Melcher), who are the defendant Charles G. Stevens and one George F. Richardson, have commenced an action somewhat in the nature of partition, and have made the trustees under the twelfth clause defendants therein, and as Charles G. Stevens is one of the plaintiffs in that action of partition, and is also one of the trustees of Mrs. Paget under the twelfth clause, and the defendant John L. Melcher is also such trustee under the latter clause, and is also the husband of Mrs. Melcher, the *cestui que trust* in such eleventh clause, it is alleged that the plaintiff Mrs. Paget is in danger of not being properly represented in that action.

This in substance is the cause of action as set up in the complaint. Some of the parties defendant have appeared in the action, but among those who have not appeared is the non-resident defendant Charles G. Stevens.

The plaintiffs procured an order for the publication of the summons as against him and some other non-residents, and he has appeared specially for the sole purpose of making a motion to set aside the order of publication so far as he was concerned, and upon the ground that the action was not one which, upon the facts set forth, was within the jurisdiction of the Court of Common Pleas of New York. The motion has been denied by the courts below and the defendant Stevens has appealed to this court.

The Code of Civil Procedure provides in section 438 for

the granting of an order directing the service of a summons upon a defendant without the state by publication. Section 439 of the Code provides that the order must be founded upon a verified complaint showing a sufficient cause of action against the defendant to be served, etc. This language does not mean simply a complaint which would withstand a demurrer based upon the ground that it did not state facts sufficient to constitute a cause of action. The cause of action which is sufficient is one against the defendant of which the court can take cognizance. In this case it must be one of which the court has jurisdiction (as to defendant Charles G. Stevens) upon the assumption that he is a non-resident. This meaning has been adjudged to be the correct one in *Bryan v. University Co.* (112 N. Y. 382, 386).

We are, therefore, remitted to the question whether the cause of action as against defendant Charles G. Stevens which is set forth in the complaint is one over which the Court of Common Pleas of New York has jurisdiction, assuming that he was a resident of the state of Massachusetts at the time the action was commenced. The court named is one of the Superior City Courts mentioned in the Code. (Code of Civil Procedure, § 3343.) The jurisdiction of such a court is stated in section 263. There are several subdivisions to that section, and the plaintiffs contend this cause of action is provided for in the first, the second and the sixth subdivisions thereof. The material portion of the first subdivision referred to grants jurisdiction to the court "in every other action to recover or to procure a judgment establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property or a chattel real. But jurisdiction attaches under this subdivision only where the real property to which the action relates is situated within the city where the court is located." Jurisdiction is extended by the second subdivision "to an action for any other cause, where the cause of action arose within" the city where the court is located, and by the sixth subdivision "to an action for any cause brought by a resident of the city wherein the

court is located, against a natural person who is not a resident of the state."

We think that not one of the subdivisions embraces such an action as this.

The first subdivision does not touch it for the reason that the action does not in any manner affect or determine the title to or any interest in real property or a chattel real. The judgment in the action could not adjudge anything in regard to the title within the meaning of the statute. The object and purpose of the action are to remove trustees of a trust created under the will of Mr. Stevens. It is a purely personal action having no connection whatever with the title to the real property held under the trust. It is true that the judgment might remove the trustees and so divest them of the title to the real property. But they hold it simply as representatives, and not in their own right, and precisely the same title which they held would remain in the survivor (Mrs. Stevens) or pass to successors appointed by the court and wholly unaffected by its decree. The judgment would simply determine the person who ought or ought not to hold the title as a trustee, without any individual or personal interest therein, and its extent and quality would remain without any adjudication regarding it, and precisely the same in the successors as it was in the trustees who might be removed by the judgment of the court. It is not even a case of rival claimants to the trusteeship under the same clause in the will, each claiming to be, and appealing to the court for a decision as to which was such trustee and the holder of the title. Nothing whatever in regard to the title as such could or is sought to be adjudged in this action.

The only question arising herein is as to who shall hold, as a mere representative, the title to real property which is undisputed and not the subject of litigation. Whatever judgment may be entered, the title to the property remains the same that it is in the trustees of the trust created by Mr. Stevens' will, and to determine whether one trustee shall be removed and another appointed in his place with precisely the

same rights, powers and duties and holding exactly the same title as his predecessor, cannot in any legal sense be said, within the proper meaning of the statute, to establish, determine, define, forfeit, annul or otherwise affect an estate, right, title; lien or other interest in real property or a chattel real. It only affects the person who shall, without any personal or individual interest therein hold a title which is not disputed and for the purposes of a trust, the meaning and extent of which are not involved and in regard to which no judgment could be given. To remove a trustee under such facts does not in any legal sense of this statute forfeit or annul an estate.

This construction of the statute is neither metaphysical nor subtle. On the contrary, it seems to us a very plain and natural one. The preceding portion of the first subdivision of section 263 indicates quite plainly what the nature of the various actions contemplated in the section was to be. The action was in some manner to recover or to affect, to foreclose or to forfeit the title claimed by another, so that when the judgment was pronounced such title would be defined or adjudged either good or bad, forfeited to one claiming adversely or forfeited or cut off by some superior claim. Adverse or conflicting interests in the real property would be determined or adjudged by an action of the nature contemplated in the section. It would be a most strained and unnatural construction to hold that such an action as this would come under the terms of the statute when the only matter really determined would be whether a mere stakeholder, so to speak, was a proper depository of the title which was undisputed, or whether he had been guilty of such acts as would render his removal proper, the title to the property in such case vesting in his successor and no judgment given in regard to its extent, quality or character. We cannot believe it was ever the intention of the legislature to include such an action within the meaning of the section, and we believe it did not in fact so include it.

In this view it is not necessary to determine or further to notice the other objection raised by defendant Stevens, that

as part of the real property embraced in the trust lies in the state of Massachusetts, the New York Court of Common Pleas can have no jurisdiction because of the provision in the Code that the real property to which the action relates must be situated within the city where the court is located. 'The action does not, within this section, relate to real estate.

Nor do we think that the provision of the second subdivision of section 263 covers this case.

The "cause of action" did not arise in the city of New York so far as regards defendant Stevens. During all the time mentioned in the complaint he has been a resident of the state of Massachusetts, and the cause of action is his alleged misconduct as trustee. There is no pretense that he has done an act in New York. His alleged misconduct it is claimed might as a consequence possibly harm the trust estate. If this were true, that estate is in no sense the subject of the action, nor is it the cause of action. That cause is, as I have said, the alleged misconduct of Mr. Stevens, his breach of or failure to perform his duty as a trustee, and that arose in the place where he resided and assumed to act as trustee and where such alleged breach occurred. Assuming the correctness of the plaintiffs' claim that it is in New York that Mrs. Paget is exposed to the danger of being represented by improper and unfriendly attorneys, it does not on that account appear that the cause of action against Mr. Stevens arose in that city. This alleged danger is but a consequence of the alleged misconduct; it is not, and in and of itself it cannot form or constitute a cause of action. The subject of the action is in no sense the trust property. It is the alleged breach of duty of the trustee, as a consequence of which it is claimed that harm may result to such property. The preservation of the trust property may be one of the results which plaintiffs claim would flow from the removal of the trustee, but the preservation of such property is in no legal sense the cause of action. To call an action brought to remove a trustee from his trust because of his personal conduct or misconduct as such trustee, one in which the cause of action is the

preservation and management of the trust property, seems to us a subversion of the meaning of language. The judgment cannot control the management of the trust estate, for in any event it is to be managed by trustees who are to carry out the purpose and end of such trust, and no person who might be appointed would have any other or different powers of management than his predecessor, and no relief is sought or could be granted which would be in the least inconsistent with this fact.

Finally, the court takes no jurisdiction by virtue of the sixth subdivision of the section. The action is not brought by a resident of the city wherein the court is located, against a natural person who is not a resident of the state. This subdivision includes the case where the sole plaintiff or all the plaintiffs are residents of the city. In this case one of the plaintiffs (Mrs. Paget) is a citizen of London in the kingdom of Great Britain. Mrs. Paget is not a merely formal party to the action, assuming such fact to constitute an exception to the rule. She is the *cestui que trust* and of the two plaintiffs she is the person alone who is substantially interested in the performance of the trust. By the joining of the third trustee (her mother) with her as plaintiff, the court does not thereby acquire a jurisdiction by reason of the residence of the trustee in the city of New York, which otherwise it would not possess. One of the plaintiffs has not the necessary jurisdictional residence in that city, and the objection is not rendered without force by proof that another of the plaintiffs has. Where citizenship or residence is requisite on the part of plaintiffs, it has always been held that the fact must exist in regard to all the plaintiffs. This has been so held in the United States courts in reference to citizenship, and we think it is the plain meaning of the statute.

We agree with the able and satisfactory dissenting opinion delivered by the learned judge at the General Term of the Common Pleas, and we might well have rested our judgment upon it, but as the case here was necessarily argued somewhat briefly, we have felt that although in our judgment it was

quite a plain one, yet it would be well, considering the importance of the question involved, not only to give it most mature consideration, but also to elaborate somewhat the reasons for the conclusion at which we have arrived.

The order appealed from must be reversed, with costs in all courts, and the motion to set the order of publication aside, so far as defendant Charles G. Stevens is concerned, must be granted, with costs.

All concur, except ANDREWS, Ch. J., not sitting, and GRAY, J., not voting.

Ordered accordingly.

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CHARLES R. FRACE, Respondent, v. THE NEW YORK, LAKE
ERIE AND WESTERN RAILROAD COMPANY, Appellant.

In an action to recover damages for the destruction of plaintiff's property by a fire alleged to have been kindled by sparks which escaped from an engine passing on defendant's road, it appeared that what is known as a "straight stack spark arrester" was used upon the engine, and the evidence was uncontradicted that this kind of spark arrester was in general use on many of the large railroads and on some was almost exclusively employed, and that it in fact arrested sparks as well as any kind that was known. The question was submitted by the trial court to the jury as to defendant's negligence in the adoption of a proper system or kind of spark arresters. *Held*, error.

Cornish v. F. B. F. Ins. Co. (74 N. Y. 295), distinguished.

It seems, the court may take judicial notice that the "diamond stack" and the "straight stack spark arresters" are in very general use upon the railroads of the country, and are both well-known systems for arresting sparks.

The property destroyed was a barn and an hotel about forty feet distant therefrom. The barn first caught fire. The court charged that to justify a verdict including the value of the hotel the jury must find "that the same was destroyed by reason of the fire being communicated thereto directly from the engine, or without the assistance of other agencies. *Held*, no error.

It seems, the doctrine of the case of *Ryan v. N. Y. C. R. R. Co.* (35 N. Y. 210) not to be extended beyond the precise facts appearing therein.

(Argued June 12, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 28, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought to recover damages for the destruction of plaintiff's property by a fire caused by sparks or coals alleged to have been negligently thrown from a passing engine of defendant.

The property destroyed was a barn and hotel. The buildings were about forty feet apart. The barn first caught fire and thereafter the hotel.

The court charged, among other things, as follows:

"In order to justify you in finding a verdict for the plaintiff for the value of the buildings, it is incumbent upon you to find from the evidence in the case that the destruction of the barn was the direct and natural cause of the fire being emitted from the engine, and if you find that the fire was emitted from the engine immediately to the house, under the circumstances to which I have called your attention, the plaintiff would be entitled to recover. To justify a verdict covering or including the value of the hotel, you must find that the same was destroyed by reason of the fire being communicated thereto directly from the engine, or without the assistance of other agencies and arising from other causes. This is a question for you to determine from the evidence."

The further material facts are stated in the opinion.

James H. Stevens for appellant. The defendant was not guilty of negligence in causing the burning of the hotel barn. (*Odell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 323; *O'Neill v. R. R. Co.*, 115 id. 583; Code Civ. Pro. § 999; *Teinkauf v. Lombard*, 137 N. Y. 417; *Searls v. M. R. Co.*, 101 id. 661.) If the defendant is considered liable for the burning of the barn, yet there is no liability for the burning of the hotel, which by the undisputed evidence took fire from the burning barn, and that, too, as we contend, after a change

of the wind, which was blowing a furious gale. Such damages are too remote. (*Read v. Nichols*, 118 N. Y. 224; *Reiper v. Nichols*, 31 Hun, 491.) It is respectfully submitted that if there can be a case of contributory negligence in a fire case, this is one. (*In re U., etc., R. R. Co.*, 56 Barb. 456.) As it cannot be known which kind of cinders or sparks set the fire, if at all, there is a failure of proof and the motion for a non-suit should have been granted for a failure to prove a cause of action. (*Grant Case*, 133 N. Y. 659; *Safford Case*, 74 Hun, 306, 307.) The objections should have been sustained to the questions put to Elmer A. Chase by plaintiff. (*Ferguson v. Hubbell*, 97 N. Y. 507.)

Clarence A. Farnum for respondent. The evidence given upon the trial raised a question of fact and warranted a recovery by the plaintiff. (*Sheldon v. H. R. R. Co.*, 14 N. Y. 218; *Westfield v. E. R. Co.*, 5 Hun, 75; *Corse v. N. C. R. R. Co.*, 59 Barb. 644; *Field v. N. Y. C. R. R. Co.*, 32 N. Y. 339; *Christ v. E. R. Co.*, 58 id. 638; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 id. 562; *Genung v. N. Y. & N. E. R. R. Co.*, 21 N. Y. Supp. 97; *O'Neill v. N. Y., O. & W. R. R. Co.*, 115 N. Y. 579; *Collins v. N. Y. C. & H. R. R. Co.*, 11 N. Y. Supp. 308; 33 N. Y. S. R. 569; 132 N. Y. 603; *M. P. R. Co. v. T. & P. R. Co.*, 41 Fed. Rep. 917; *Burke v. M. R. Co.*, 13 Daly, 75; *Billings v. F. R. R. Co.*, 11 N. Y. Supp. 837; 58 Hun, 605; 128 N. Y. 644.) The plaintiff is entitled to recover for the burning of the hotel and the personal property therein as well as for the barn, such burning being the proximate and natural result of the burning of the barn. (*Webb v. R., W. & O. R. R. Co.*, 49 N. Y. 420; *Pollett v. Long*, 56 id. 200; *Ehrgott v. Mayor, etc.*, 96 id. 264; *Pielke v. C., M. & S. P. R. Co.*, 5 Dak. 444; *Vallo v. U. S. E. Co.*, 147 Penn. St. 404; *Van Fleet v. N. Y. C. R. R. Co.*, 7 N. Y. Supp. 636; *Adams v. Young*, 14 Ohio St. 80; *Butcher v. V. V. R. Co.*, 67 Cal. 518; *Cohen v. Mayor*, 113 N. Y. 532; *Gibney v. State*, 137 id. 5, 6; *Hill v. Winsor*, 118 Mass. 251; *Eton v. Lyster*, 60 N. Y. 252; *Lowery v. M. R.*

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Co., 99 id. 158; *C. & A. R. R. Co. v. Pennell*, 110 Ill. 435; *M. & S. P. R. Co. v. Kellogg*, 94 U. S. 469.) The exception of the defendant to the question put to and its answer of the witness Daniel Frace, that about three weeks prior to this fire he saw sparks and cinders come from the smoke stack of defendant's engine, is unavailing, for it appears it was the same engine No. 579 which set this fire complained of, and that it threw cinders as large as a hickory nut and set fire to the hotel three weeks before. It is competent to show other fires. (*Collins v. N. Y. C. & H. R. R. Co.*, 132 N. Y. 603; *Field v. N. Y. C. R. R. Co.*, 32 id. 339; *Westfield v. E. R. Co.*, 5 Hun, 75; *G. T. R. Co. v. Richardson*, 91 U. S. 454; *Webb v. R., W. & O. R. R. Co.*, 49 N. Y. 420; *C., S. P., M. & O. R. Co. v. Gilbert*, 52 Fed. Rep. 711.) The exceptions which related to the exclusion of the evidence denying the defendant the right of showing that the plaintiff had received from insurance companies the value of his buildings and their contents are unavailing. (*M. S. Bank v. Pierce*, 137 N. Y. 444; *Collins v. N. Y. C. & H. R. R. Co.*, 5 Hun, 503; 71 N. Y. 609; *Merrick v. Brainard*, 38 Barb. 574; 34 N. Y. 208; *Briggs v. N. Y. C. & H. R. R. Co.*, 72 id. 26; *Weber v. M. & E. R. Co.*, 35 N. J. Law, 409; *Carpenter v. E. T. Co.*, 67 Barb. 570; *Yates v. Whyte*, 4 Bing. [N. C.] 272; *Clark v. Inhabitants*, 2 B. & C. 254; *C. U. A. Co. v. Lister*, L. R. [9 Ch. App.] 483; *Bradburn v. G. W. R. Co.*, 10 Exch. 1; *Cornish v. F. B. F. Ins. Co.*, 74 N. Y. 295.) Even if the jury should have believed that the defendant had adopted the most approved system of spark arresters and the same were in proper and suitable condition, it might very properly have found that running through the village at this dry time, with a very high wind blowing from the track to the wooden building close to it without shutting off the discharge of sparks was negligence itself. (*Fero v. B. & S. L. R. R. Co.*, 22 N. Y. 209; *Hockstader v. D. & S. C. R. Co.*, 55 N. W. Rep. 74.) There being a conflict of evidence as to the cause of the fire, the negligence or want of negligence of the defendant, so that the jury would be warranted in finding for

either party, the verdict is conclusive. (*Chaffe v. Morse*, 67 Barb. 252; *Perry v. Lansing*, 17 Hun, 34; *Hays v. Schuyler*, 2 id. 518; *Morse v. Sherrell*, 63 Barb. 21; *Kingsland v. Hall*, 16 N. Y. Supp. 862; *Tonnley v. F. B. C. Co.*, 59 Hun, 616; *Peck v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 587.)

PECKHAM, J. Among other questions of fact submitted to the jury, which if found in favor of the plaintiff a verdict for him might be based, was the question whether the system of spark arresters used by defendant was suitable and whether defendant was guilty of any negligence in using that system.

The jury were permitted by the charge of the learned judge to say that the system of spark arresters was not a proper one, and that it was not one of the most approved devices known for the prevention of the escape of sparks or cinders from the engine. The evidence was entirely uncontradicted and tended solely to one result, viz., that the straight stack spark arrester was at least as good as any system that was known. Some of the witnesses said that it was *the* improved spark arrester, as good as any spark arresters that were known to railroad men. It began to come into use about 1880 and was much used for freight trains. There was the straight stack without the extension. There were also some with an extension and there were diamond stack engines, but the latter were, perhaps, not quite so good as others. The straight stack without the extension was the kind of spark arrester that was used on the engine in question. The fact was testified to by witnesses for the defendant who were among its employees, but they were men who were not responsible for the system of spark arresters that was adopted or in general use upon defendant's road, and they were testifying upon a subject well known among all men familiar with railroad engines and the system of spark arresters in existence or adopted by different railroads, and if there had been in fact the least doubt upon the question regarding which they testified, evidence contradicting or explaining their testimony could have been easily adduced.

In the plaintiff's complaint there was an allegation that the

defendant had not equipped or provided the engine with a kind of spark arrester that was reasonably safe and such as was in common use by the railroads of the state and had been for a long time to the knowledge of defendant, and which it was its duty to put upon and provide its locomotives with for the protection of property along the line of its road.

Upon the trial the plaintiff gave no evidence to sustain this particular allegation, and the only evidence in the case came, so far as this issue is concerned, from the defendant, and that was to the effect already stated. The real issue made by the plaintiff, and to which his evidence was directed, was that of negligence in regard to the condition of this particular spark arrester and its being out of repair and its meshes too large, so that sparks of an unnecessarily large size escaped therefrom and in fact set the fire in question.

The engine had just been equipped with this new spark arrester, the change having been made from the diamond stack kind. In the case of *Flinn v. Central Hudson Railroad* (142 N. Y. 11) the diamond stack spark arrester was used and the claim was made by the plaintiff in that case that the defendant should be held liable because it had not adopted the straight stack spark arrester, such as was used upon this engine. Here the claim seems to be just the opposite, and the jury was permitted upon the evidence in the case to find that the straight stack system was not a good one and the diamond stack should have been used. Thus, whichever kind may be used by a railroad company, it is open to the plaintiff to claim that it was the other that should have been used, and the question must, therefore, be submitted to the jury.

We think the court can take judicial notice of the fact that diamond stack and straight stack spark arresters are in very general use upon the railroads of the country and that they are both well-known systems for arresting sparks, while no system that has yet been invented can wholly prevent the emission of live sparks from an engine under certain circumstances. In the *Flinn* case we held that the defendant could not be found guilty of negligence in failing to introduce upon

its road the straight stack extension (the kind actually used in the case at bar) within the time then existing since its invention, even assuming that the straight stack was an improvement on the old diamond stack form. Here the jury is permitted to find, in opposition to the whole evidence in the case, that the straight stack extension is not a proper system of spark arrester. We hold it was error to submit to the jury the question of defendant's negligence in the adoption of a proper system or kind of spark arrester.

The case is not within the principle decided in *Cornish v. Insurance Co.* (74 N. Y. 295). In that case it was held that the testimony of experts, although uncontradicted, is not conclusive, except in cases where none but experts are capable of determining the question. That was a case depending upon special circumstances, and the jury was called upon to judge whether the general principles governing somewhat similar cases, as testified to by the experts, were applicable to the case before them. It was a question as to what really increased the risk in an insurance against fire, and although a question of fact, insurance men who were engaged in the business of insuring property or procuring policies of insurance thereon, were called as witnesses to state whether the risk was in fact increased by permitting a building under the circumstances to remain unoccupied. Although the experts testified that the risk was thus increased, yet it was, of course, but a matter of judgment or opinion, and upon a question that the jury must itself decide. So, although the expert evidence was admissible upon that issue and was also uncontradicted, it was held by this court not to be conclusive.

The evidence in this case is of a much more comprehensive nature. The question was whether there was any other system better or as well known, and which, indisputably, was more suitable than the one used by defendant for the arresting of sparks. The witnesses testified that this particular system was in general use on many of the large railroads, and on some was almost exclusively employed, and that it, in fact, arrested sparks as well as any kind that was known. The plaintiff gave

no evidence to the contrary, and these facts stood proved by the evidence of seemingly respectable, intelligent and credible witnesses, and the proof was uncontradicted.

We think there is so much difference in the kind of evidence given in the two cases as to render that of *Cornish* (*supra*) inapplicable to the case at bar.

The error necessitates the granting of a new trial for the reason that we cannot possibly say that the jury based their verdict upon some other fact, and not upon a finding that the system of spark arresters was improper and inappropriate. As there must be a new trial, the question of the liability of the defendant for the burning of the hotel will again arise. We think the charge of the learned judge upon this part of the case was as favorable to the defendant as it could properly ask. The question was left as one of fact, under all the circumstances, as to whether the burning of the hotel were not the natural and direct result of the sparks from the engine. In this case the court committed no error to the prejudice of the defendant. The *Ryan Case* (35 N. Y. 210) should not be extended beyond the precise facts which appear therein. Even if correctly applied in that case, the principle ought not to be applied to other facts. (See *Webb v. Railroad Co.*, 49 N. Y. 420; *Pollett v. Long*, 56 id. 200; *Lowery v. Manhattan Railway Co.*, 99 id. 158; *O'Neill v. Railroad Co.*, 115 id. 579.)

For the error above stated the judgment must be reversed and a new trial granted, with costs to abide the event.

All concur, except ANDREWS, Ch. J., not sitting.

Judgment reversed.

JOHN H. HOWE, Respondent, v. JULIETTE BELL et al., as
Executors, etc., Appellants.

JULIETTE BELL et al., as Executors, etc., et al., Appellants, v.
JOHN H. HOWE, Respondent.

In 1858 N., who was the owner of a tract of land in the city of R., laid out the same into lots and streets and caused a map thereof to be made and filed. This map showed lot No. 20 to be ninety feet front on one of the streets. Lot No. 4 as laid out on the map fronted on the same street and adjoined lot 20 on the north. A. sold and conveyed lot 4. In the deed the south line thereof was described as the north line of lot No. 20. After such conveyance A. filed a second map, on which was laid out an alley fifteen feet wide on the northerly side of lot 20, which connected with another alley, and on the same day recorded an instrument stating that said alleys were for the use of certain lots specified, not including lot 4. Lot 20 was subsequently conveyed by deed referring to the second map. In an action of ejectment brought by the owner of lot 20 against the owners of lot 4, to recover possession of the alley, *held*, that the legal effect of the instrument of dedication was simply to impose an easement on lot 20 for the benefit of the lots named; that lot 4 was not included in said benefits, and its owner had no right to the use of the alley; that the purchaser of lot 20 took title to the lot as originally laid out, subject simply to said easement, and so that his successor in title was entitled to maintain the action.

A. was dead at the time of the trial; his son was called as a witness, and testified that the maps were made and filed in the order above stated. His evidence was objected to as incompetent under the provision of the Code of Civil Procedure (§ 829) on the ground that the father of the witness was the common grantor of the parties. *Held*, untenable, as the owners of lot 4 took no title from A. of the land in dispute.

(Argued June 12, 1894; decided October 9, 1894.)

APPEAL from judgments of the General Term of the Supreme Court in the fifth judicial department, entered upon orders made June 23, 1892, one of which affirmed a judgment in favor of the plaintiff in the first above-entitled action and the other affirmed a judgment in favor of the defendant in the second above-entitled action, both of which judgments were entered upon reports of referees.

The first above-entitled action was one of ejectment.

The second action was brought to restrain the defendant

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from entering upon the land described in the complaint and committing irreparable injury.

Both actions related to the same premises.

The facts, so far as material, are stated in the opinion.

John Van Voorhis for appellants in first above-entitled case. The complaint alleges that the plaintiff is the owner in fee of the land in controversy and entitled to the possession. The referee so found and the judgment so decides. It is not an action to recover an easement. Ejectment will not lie for that. (*Child v. Chappell*, 9 N. Y. 246; *Ogden v. Jennings*, 62 id. 526; *Language v. Anderson*, 101 id. 625; *Griffiths v. Morrison*, 106 id. 165.) Alley B, as laid down on map 2, is not and was never intended to be a public street, but only a private easement. (*Story v. N. Y. E. R. R. Co.*, 90 N. Y. 180; *Bissell v. N. Y. C. R. R. Co.*, 23 id. 64; *Perrin v. N. Y. C. R. R. Co.*, 36 id. 120; *Bakeman v. Talbot*, 31 id. 366; *Brill v. Brill*, 108 id. 511.) The easement was extinguished by act of all the interested parties. (*Pope v. O'Hara*, 48 N. Y. 456; *Morse v. Copeland*, 2 Gray, 302; *Dyer v. Sandford*, 9 Metc. 395; *Winter v. Brockville*, 8 East, 308; *Volger v. Geiss*, 51 Md. 407; *Hamilton v. Farrar*, 128 Mass. 492; *King v. Murphy*, 140 id. 254; *Cartwright v. Mapleson*, 53 N. Y. 622; *Taylor v. Hampton*, 4 McCord, 61, 96; *Steere v. Tiffany*, 18 R. I. 568; *Snell v. Levet*, 110 N. Y. 595; *Corning v. Gould*, 16 Wend. 531.) Alfred Bell and his grantors had possession of the land in question, claiming title thereto, for a period of more than twenty years prior to the commencement of this action. The defense is raised by the answer. It is something more than the Statute of Limitations. (*Baker v. Oakwood*, 123 N. Y. 16; Code Civ. Pro. §§ 365, 371; *Thompson v. Burnhanes*, 79 N. Y. 93.) The referee erred in rejecting testimony offered by Alfred Bell. (*Jackson v. Vredenberg*, 1 Johns. 159; *Morse v. Jacobs*, 35 How. Pr. 90; *Edwinston v. Edwinston*, 13 Hun, 133; *Hardenburg v. Quarry*, 50 Barb. 32; *Parsons v. Brown*, 15 id. 590; *Van Rensselaar v. Vickery*,

3 Lans. 57; *Ham v. Van Orden*, 84 N. Y. 271.) All the conveyances of the land in question, since September, 1870, the time Alfred Bell went into possession, are void under the statute. (1 R. S. 737, § 147; 3 id. [7th ed.] 2169; *Smitth v. Long*, 12 Abb. [N. C.] 113; *Palmer v. Morrison*, 104 N. Y. 137; *Chamberlin v. Taylor*, 105 id. 185; *Sands v. Hughes*, 53 id. 287; *Dawley v. Brown*, 79 id. 360; *Van Voorhis v. Kelley*, 31 Hun, 293; *Church v. Schoonmaker*, 42 id. 528; *Abrams v. Rhoner*, 44 id. 507; *Snyder v. Church*, 53 N. Y. S. R. 674.) The north line of lot 20 has been located ever since said map Exhibit 2 was made, July 28, 1853. As located it is the south line of the alley in dispute. (*George v. Toll*, 39 How. Pr. 497; *Ham v. Van Orden*, 84 N. Y. 271.) The referee erred in finding as a fact that the use made by the defendant Bell, of the lands in controversy, during the lifetime of Amos Wilmot, was consistent with the claim on the part of said Bell, of an easement only in such lands as an alley or passageway appurtenant to said lot No. 4. The erroneous character of this finding is apparent. (*Doolittle v. Tice*, 41 Barb. 181; *Barnes v. Light*, 116 N. Y. 34; *Landes v. Brandt*, 10 How. [U. S.] 348; *Hughes v. U. S.*, 4 Wall. 232; *Bradstreet v. Huntington*, 5 Pet. 402.)

Nathaniel Foote for respondent in first above-entitled case.

John Van Voorhis for appellants in second above-entitled case.

Nathaniel Foote for respondent in second above-entitled case. The use of the alley by either Mr. or Mrs. Van Epps was never such as to initiate a claim of title in fee adverse to the true owner. (Code Civ. Pro. §§ 368, 369, 371; *Bliss v. Johnson*, 94 N. Y. 235.) The use made of the alley by Van Epps was as an alley and not otherwise. (*Wilsh v. Taylor*, 50 Hun, 137.) The use of the alley by Mr. Bell has not been such as to constitute adverse possession. (*Village of Olean v. Steyner*, 135 N. Y. 341; *Müller v. L. I. R. R. Co.*, 71 id. 380.) The fee to the land in the so-called alley passed to the

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grantees of lot No. 20, under the several conveyances of that lot by its number and by reference to the map and allotment of the tract. (*Bissell v. N. Y. C. & H. R. R. Co.*, 23 N. Y. 61; *Haberman v. Baker*, 128 id. 253; *Hennessey v. Murdock*, 137 id. 317.) If the fee to the land in the alley did not pass under the several conveyances of lot No. 20 by its number, then it did pass under the general assignment made by William E. Arnold, and became vested in the defendant Howe by the chain of the title from Arnold's assignee as a separate property. (*Perrin v. N. Y. C. R. R. Co.*, 36 N. Y. 120; *Haberman v. Baker*, 128 id. 253.) None of the deeds in Howe's chain of the title are void for champerty. (*Dougherty v. Matsell*, 119 N. Y. 646; *Danziger v. Boyd*, 120 id. 628.) At the commencement of this action Mr. Howe had both title to and possession of the lands in controversy. (*Bliss v. Johnson*, 94 N. Y. 235.) The rulings of the referee upon the reception and rejection of evidence were correct, and none of the exceptions to such rulings were well taken. (Code Civ. Pro. § 829; *Nicolay v. Unger*, 80 N. Y. 54.) The exceptions by plaintiff's counsel to the findings of fact and conclusions of law made by the referee in his report, and to the rulings of the referee upon the requests for findings of fact and conclusions of law submitted by plaintiff's counsel, are none of them well taken. (*Outwater v. Moor*, 124 N. Y. 66.)

BARTLETT, J. The executors and widow of Alfred Bell, deceased, are the appellants in two actions, which were argued together in this court. The object of these litigations is to determine the title to an alley fifteen feet in width and about one hundred and sixty feet in depth, lying between the residence of the late Alfred Bell and the residence of Joseph H. Howe, in the city of Rochester.

In September, 1889, Bell brought an action against Howe to restrain defendant from trespassing on the disputed land. In July, 1890, Howe sued Bell in ejectment to recover the premises in question. Both cases were referred and tried

together, and resulted in a judgment dismissing the complaint in Bell against Howe, and a judgment for the plaintiff in Howe against Bell. Appeals were taken and the General Term affirmed both judgments. Pending these appeals, Alfred Bell died, and his executors and widow were duly substituted in each action as parties.

In affirming the judgments below, we might well rest satisfied with the opinion of the learned General Term, but, in view of the elaborate briefs and arguments of counsel, we will briefly consider the controlling points in this controversy. Alfred Bell sought to establish a paper title to the disputed strip of land, and, failing in that, he insisted that he and his grantors had been in adverse possession for more than twenty years. The finding of the referee that Bell and his grantors did not occupy the disputed strip adversely for more than twenty years is sustained by the evidence and is binding upon this court. It follows, therefore, that unless Bell established a paper title the judgments below must be affirmed. The material facts are as follows, viz.: In May, 1853, one William E. Arnold became the owner of a tract of land in the city of Rochester, subsequently designated by him as the "Arnold Tract," which included the land in controversy and the premises of the two litigants. This tract was bounded on the west by Meigs street; on the north by East avenue, and on the east by Goodman street. Bell's premises are located at the southwest corner of East avenue and Goodman street, and Howe's premises front on Goodman street and adjoin Bell's land on the south. The disputed land lies between these two properties. On or about the 28th of July, 1853, Arnold caused to be made and filed in the Monroe county clerk's office a map of his tract, above referred to, showing his subdivision thereof into lots and the location and dimensions of each lot. This map is in evidence and shows Bell's premises as lot No. 4 and Howe's premises as lot No. 20. This map is dated July 28th, 1853, and must have been filed before August 1st, 1853, as Arnold conveyed on the latter day lot No. 4 on said map to George C. Buell and referred to the map as on file. The

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south line of lot No. 4 was described as the north line of lot No. 20. The map shows lot No. 20 to be ninety feet front on Goodman street, which includes therein the disputed strip, for if Bell's claim were allowed lot No. 20 would be only seventy-five feet on Goodman street. It is, therefore, absolutely certain that Arnold's deed to Buell of lot No. 4 conveyed no portion of the disputed strip. On the 28th of September, 1853, Arnold made and filed a second map upon which he indicated the alley in question across lot No. 20 on the northerly side thereof from Goodman street to its rear and fifteen feet in width, and also an alley across the rear of lot No. 20, and of other lots fronting on Goodman street and connecting with the alley on the north side of lot No. 20. On the same day Arnold recorded an instrument under his hand and seal in which he declared, among other things, that the passageway indicated upon the map represented an alley for the use of the owners of certain lots specified, lot No. 20 being named, but lot No. 4 was omitted, as Arnold had already sold it to Buell. This deed of dedication is significant in three aspects: It shows that the laying out of the alley on the second map was a mere easement for the benefit of lots designated therein; that lot No. 4 was excluded from said benefits as it was no longer owned by Arnold, and that the first map filed in July, 1853, was the basis of the second map and recognized the location and dimensions of the lots laid out thereon. In 1865 the title of Buell by mesne conveyances became vested in Sarah H. Van Epps, the immediate grantor of Bell, by the description that Arnold conveyed to Buell. In 1870 Sarah H. Van Epps and husband conveyed lot No. 4 to Alfred Bell by warranty deed, and on the same day they executed and delivered to Bell a quit-claim deed of the alley or strip in question.

This constitutes the paper title of Alfred Bell. These record facts show conclusively that Alfred Bell had no legal title to the land in dispute, and that his quit-claim deed from Mrs. Van Epps was mere waste paper. The fact that she did not include the alley in her warranty deed is most significant.

The title of John H. Howe to lot No. 20 is fully established.

It is clear that the legal effect of Arnold's deed of dedication was to impose only an easement on lot No. 20, and did not reduce or change its original frontage of ninety feet on Goodman street. At the time Arnold laid out his tract in question lot No. 20, with others, was subject to a mortgage subsequently foreclosed, and on the 28th of December, 1859, the referee deeded lot No. 20, by reference to the second map, the legal effect being to convey this lot with ninety feet frontage on Goodman street. What effect this conveyance had on the easement sought to be created by Arnold it is not necessary to determine at this time, as the legal representatives of Bell and his widow have no interest in the matter.

This foreclosure title, by several mesne conveyances, was vested in Howe April 16th, 1889. In October, 1857, Arnold made a general assignment for the benefit of his creditors, and Howe, by mesne conveyances, became vested April 16th, 1889, with any title Arnold may have had in lot No. 20 at the time of his general assignment. It is clear that Howe's title through the foreclosure proceedings was perfect, and that the equity of redemption, if it passed to Arnold's assignees, was cut off. The fundamental error in the argument urged to sustain the Bell title is in assuming and insisting that the second map (exhibit 2), showing the alley already referred to, changed the line between lots No. 4 and No. 20, was in existence on August 1st, 1853, and was referred to by Arnold in his deed of that date to Buell conveying lot No. 4. An examination of the two maps in connection with Arnold's dedication deed of Sept. 28th, 1853, demonstrates that the only map on file August 1st, 1853, was exhibit 13 in this case, which fixed the frontage of lot No. 20 on Goodman street as ninety feet. The fact that the second map, laying out the alley, puts the frontage of lot No. 20 at seventy-five feet and that of the alley at fifteen feet is of no importance, as it was a mere mode employed to express the width of the strip over which the easement was created. The mortgage on lot No. 20 covered the entire frontage of ninety feet, and that title is vested by the foreclosure in Joseph H. Howe.

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Having established the existence of the maps in the order pointed out, the argument in support of Bell's paper title falls to the ground. The evidence furnished by the maps and dedication deed of William E. Arnold was supplemented by the evidence of William E. Arnold's son, Hobart G. Arnold, the former being dead at the time of the trial. This witness swore that the maps were made and filed in the order as above indicated. This evidence was objected to as incompetent, under section 829 of the Code of Civil Procedure, on the ground that the father of the witness was the common grantor of Bell and Howe. The facts already discussed establish that Bell took no title from Arnold of the land in dispute. The exceptions to the findings of the referee are disposed of by the views we have expressed, and the further fact that the findings against adverse possession are sustained by the evidence. Many of the exceptions to the admission and rejection of evidence are rendered immaterial for the same reasons.

A large number of questions were asked Bell that called for his conclusions. The referee repeatedly ruled that witness was at liberty to state the facts. We find no reversible error in his examination. There are no other exceptions in the case requiring special mention.

The judgments should be affirmed, with costs.

All concur, except ANDREWS, Ch. J., not sitting.

Judgments affirmed.

SUSAN A. PHELPS, Respondent, v. JOHN W. PHELPS et al.,
Appellants.

The position of a wife, in respect to her husband's property, is limited by the Revised Statutes, and save as brought within those limitations she is without the right to assert any claim to it.

To entitle a wife to dower the husband must be seized either in fact or in law of a present freehold in the premises as well as an estate of inheritance.

Such a seizin cannot be predicated with respect to lands purchased with the moneys of the husband, but not conveyed or agreed to be conveyed to him.

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Plaintiff's complaint alleged in substance that she was the wife of defendant, who, with intent to defraud her of her dower rights in his real estate, has purchased various pieces of land, the title to which he caused to be taken in the name of L. under a written agreement with the latter that defendant "should receive all the benefit of, and have control of said property;" that defendant did exercise full possession and control of the same, and when sold, L., pursuant to the agreement, executed conveyances to *bona fide* purchasers having no notice of plaintiff's interest, defendant receiving the purchase money; that all of the land so purchased except one piece had been thus sold and conveyed. Plaintiff asked for a judgment adjudging the proceeds of such sales to be "still real estate and that this plaintiff has an inchoate right of dower in the same," and that the piece unconveyed be adjudged subject to her right of dower. *Held*, that the complaint did not set forth a cause of action; and so, that the overruling of a demurrer thereto was error.

(Argued June 18, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 12, 1894, which affirmed an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Herbert T. Ketcham for appellant. Seizin in the husband is the first essential of the right of dower. (Statute of Uses & Trusts, § 51.) The agreement and arrangement under which Lewis is alleged to have taken title did not vest any legal estate in the defendant Phelps. (*N. Y. D. D. Co. v. Stillman*, 30 N. Y. 174.) The complaint stigmatizes the transactions as fraudulent. This is mere *petitio principii* and cannot aid the discussion. (*Holmes v. Holmes*, 3 Paige, 363.)

James D. Bell for respondent. The novelty of the present action, if indeed it be without precedent, is no bar to its maintenance. (*Youns v. Carter*, 12 Hun, 194.) An action may be maintained in the lifetime of a husband to preserve and protect the wife's inchoate right of dower in his lands, and such right is a valuable and subsisting interest which will be protected by the courts. (*Simar v. Canaday*, 53 N. Y.

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Opinion of the Court, per GRAY, J.

298; *Kursheedt v. U. D. S. Inst.*, 118 id. 364; *M. L. Ins. Co. v. Shipman*, 119 id. 330; *Youngs v. Carter*, 10 Hun, 194; 50 How. Pr. 410.) The fact that the paper title is not alleged to have been in the defendant Phelps is not a bar to the maintenance of this action. (*Hawley v. James*, 5 Paige, 318; *Giles v. Hutchinson*, 129 Mass. 27; *Crececius v. Horst*, 11 Mo. App. 304; *Rabbitt v. Gaither*, 67 Md. 94; *Babcock v. Babcock*, 53 How. Pr. 97; *Youngs v. Carter*, 10 Hun, 194; *Johnston v. Spicer*, 107 N. Y. 185.)

GRAY, J. This is an action, in equity, brought by a wife to establish and to protect an inchoate right of dower in certain lands now held by, and in the name of, a third person; but which were paid for by the plaintiff's husband, and, also, to establish her dower right in the proceeds of the sale of certain other lands similarly purchased and held. Her complaint having been demurred to for insufficiency to state a cause of action, we must assume all its averments of material facts to be true. After alleging a marriage and the birth of children, she sets forth a separation between herself and her husband, caused by his neglect, wrong conduct and desertion. She alleges that since his desertion of her, with the intent and purpose of defrauding her of her dower rights in his real estate, her husband had purchased various pieces of land, and caused the title to be taken in the name of one Lewis, as a dummy in the transaction, under an agreement and arrangement with the said Lewis that the said defendant, (meaning her husband,) "should receive all the benefit of and have full control over said property, which agreement was in writing."

She alleges that her husband "retained and exercises full possession and control over the same" and that when he desired to dispose of any of the property, he would "under the agreement and arrangement with said Lewis present the deeds and papers to him, which said Lewis, under his agreement, was bound to execute;" that all of the property, with the exception of one piece, was thus disposed of by her husband "to bona fide purchasers, without notice of the dower

interest of this plaintiff," and that her husband "received the full amount of the purchase money paid for the same, for his own use and benefit." She then proceeds to describe the piece remaining unsold; which she alleges to have been conveyed by Lewis, at the request of her husband, without consideration, to the defendant Goodwin, a partner of her husband; "who was to hold the same under the same agreement that said Lewis had with her husband," and as to this property the plaintiff charges her husband to be the real owner. She prays for a decree, which will adjudge, because of these transactions and their fraudulent purpose, that the proceeds received by her husband upon the sale of any of this property "are still real property and that this plaintiff has an inchoate right of dower in the same;" that her husband be ordered to pay one-third of these proceeds into court, there to be held and invested etc. etc. and that as to the land held by Goodwin, it be adjudged to be subject to her inchoate right of dower etc. etc.

With this as a sufficient summary of the material facts of her complaint, we are confronted with a pretended cause of action, for which I am unable to find any sufficient basis in our Revised Statutes; to which we must look for the authority for the claim of a wife to be entitled to dower in lands. To entitle the wife to dower the husband must be seized, either in fact or in law, of a present freehold in the premises, as well as of an estate of inheritance. That proposition follows from the language of the section in the Revised Statutes, that "a widow shall be endowed of the third part of all the lands, whereof her husband was seized of an estate of inheritance at any time during the marriage."

How can seizin be predicated of the plaintiff's husband with respect to the lands purchased through the use of his moneys, but never conveyed, nor agreed to be conveyed, to him? The plaintiff, certainly, had no control over the use which her husband chose to make of his personal estate. That was his absolutely and she had no interest in it which she could assert; beyond a claim upon him for the support of herself and their

children. He might have chosen to use it in the acquisition of any of the many kinds of personal property; without any right on the part of his wife to complain of, or to interfere in, his acts. Instead of confining his use of his moneys to purchases of personal property; or instead of putting them into land and of taking title to himself, he has adopted methods set forth in this complaint for its use and they were effectual to prevent the vesting in him of any legal estate in the realty, although paid for with his moneys. He, undoubtedly, intended to prevent his wife from acquiring any dower right in the real property, in the purchase and sale of which he was dealing through his friend; but, unless he was actually seized, or unless he had such a seizin at law as would entitle him to its possession, it is difficult to see how his wife could claim that she ever gained any dower interest. Her complaint seems to concede that her husband acquired no legal title, unless through the agreement alleged to have existed between him and Lewis. But that agreement is not one which could operate to vest in her husband any right to the actual possession of the property conveyed to Lewis. The agreement is purely executory in its nature and, if not complied with by Lewis, would only have given to Phelps a cause of action in damages for its breach. Taken at its strongest meaning, it cannot be said to import any grant by Lewis of any interest in the property to be acquired by him, through which a legal estate would arise in favor of Phelps. It does not rise beyond the promise of Lewis that Phelps should have the full control and enjoyment of whatever real property he might become vested with the title to, under their arrangement. Phelps' rights rested in the mere promise of Lewis. It is manifest, from the statute, that, notwithstanding the consideration for the grant of the real property to Lewis was paid by Phelps, the title vested in the grantee, free of all claims; except the claim which creditors might have to assert that the transaction was fraudulent as to them. (See §§ 51 and 52 of the article on Uses and Trusts.) It is needless to argue that wives cannot come under that classification.

The position of a wife, with respect to her husband's property, is limited by the Revised Statutes, and unless she can bring herself within their limitations, she is without the right to assert any claim to it. Concededly, in this case, the husband was never seized of the property in question and the agreement set forth, and which is claimed to confer upon him its real ownership, could create no interest, or right to possession. If it were possible to assume a right in Phelps, based upon the agreement, to maintain an action for the re-conveyance by Lewis to himself of the lands, such an assumption clearly negatives any idea of the existence of a legal estate in Phelps. We may assume, as it is alleged, that he was to receive the benefits arising from the lands; but if there was a beneficial use, it must be united with a right to the possession (a right which is not alleged here), before we can perceive the existence of any estate, upon which a claim of dower may be impressed.

It is not pretended that any precedent exists in the decisions of the courts of this state for the maintenance of this action.

So far as my examination has gone, I am unable to find in the adjudged cases any support for the proposition that a right to dower can be asserted, except with respect to real property of which the husband was actually seized during his lifetime, or to the actual seizin of which he had a legal right. The cases referred to by the respondent's counsel in the reports of the courts of other states are inapplicable in the construction of the statutes of our own state. They may, or may not, turn upon the wording of particular statutes; and, however it may be, they cannot control when our own statutes are in question.

It results from my consideration of the case, that the order and judgment below should be reversed and that an order should be entered dismissing the complaint; with costs in all the courts to these appellants.

All concur, except ANDREWS, Ch. J., not sitting.

Ordered accordingly.

HENRY EUGENE ALEXANDER, Appellant, v. JOSEPH A. DONOHUE et al., Impleaded, etc., Respondents.

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Plaintiff, who, as his complaint stated, sued as a stockholder of a mining corporation in his own behalf and that of others similarly situated, sought to set aside and annul various transactions relating to and conveyances of property alleged to belong to the corporation, on the ground that said conveyances were fraudulent, and intended to injure and defraud plaintiff and others similarly situated. Among the alleged fraudulent transactions was the foreclosure of a mortgage executed by the company. The complaint alleged that in the foreclosure suit the corporation and the trustee for the mortgage bondholders were made defendants, and appeared and answered, setting forth the same matters as were set forth in the complaint herein, and the same issues were presented in that action as in this; those issues were litigated in that action and determined against the defendants. No allegations of collusion or other grounds which would give a court of equity jurisdiction to set aside the judgment were made against it. *Held*, that plaintiff was estopped by said judgment; that plaintiff's right of action was a derivative one, he suing not primarily in his own right, but in that of the corporation, and so any defense which defendants would have if the corporation was plaintiff might be interposed against the stockholder. The complaint alleged that prior to the formation of said corporation the property was held by trustees, who had issued trust certificates, and who subsequently conveyed to another corporation; that plaintiff held certain of said certificates, which, more than twelve years before the commencement of this action, he exchanged for stock of a corporation, and subsequently exchanged said stock for the stock of the corporation as a stockholder of which he sued, to which the property had been transferred. *Held*, that plaintiff could not, at least until he had repudiated the exchange as void, claim as *cestui que trust*, and so escape the bar of the foreclosure judgment; that even if not bound to rescind and to offer to surrender his stock, and demand to be reinstated in his position as a certificate holder before the commencement of his action, or in his complaint, he was at least bound to do so on the trial, and having failed so to do could only claim as stockholder, and was bound by the foreclosure judgment.

Reported below, 68 Hun, 181.

(Argued June 8, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order

made March 17, 1893, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This action was commenced in 1882 for an accounting and distribution of the proceeds of property in which plaintiff and others had an equitable interest, alleged to have been fraudulently misappropriated by the defendants Kelly and Donohoe.

The defendants, besides Donohoe and Kelly, are Mark Brumagim, John J. McEwen, John A. Stewart, John W. Benjamin, The Farmers' Loan and Trust Company, The Mariposa Company, The Mariposa Land and Mining Company of New York and the Mariposa Land and Mining Company of California. None of the defendants answered the complaint but Donohoe, Kelly and the Farmers' Loan and Trust Company.

The plaintiff describes himself in the complaint as suing on behalf of himself and of all others who as stockholders of the Mariposa Land and Mining Company of California are assignees and successors of the original holders of the Mariposa trust certificates and first preferred stock and other stocks of the Mariposa Company under the trust deed dated April 25, 1868, and of the holders of the stock of the Mariposa Land and Mining Company of New York, and of all the right, title and interest of the original holders in and to the Mariposa estate, and who have accepted stock of the Mariposa Land and Mining Company of New York and the Mariposa Land and Mining Company of California, who are similarly situated with the plaintiff, and who will come in and contribute to the expenses of the action.

The action came to trial in 1890, and the plaintiff's counsel opened the case by recapitulating the facts set forth in the complaint, and the counsel for Donohoe and Kelly then moved that on the complaint and the opening the complaint be dismissed, and the motion was granted. The plaintiff appealed to the General Term from the judgment entered against him, and from affirmance there to this court.

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Statement of case.

Edward C. Perkins for appellant. Up to the time of the sale by the trustees to John Brumagim and his transfer of title to the New York company, and the surrender of the certificates by the holders, the Mariposa trustees (if not the certificate holders) would have been entitled, in equity, to a decree against Kelly and his confederates for relief against the title obtained by them on failure to redeem from the first tax sale, and directing a re-conveyance. (*Kortright v. Cady*, 21 N. Y. 343; *Briggs v. Davis*, 20 id. 15; *Swinburne v. Swinburne*, 28 id. 568; *Deobold v. Oppermann*, 111 id. 531; Perry on Trusts, § 828.) The subsequent changes in the form of the interest of Kelly and Donohue in the property, and the transfers of the title to the property itself, did not cut off the equitable rights of the certificate holders, arising out of the frauds thus perpetrated. (2 Story's Eq. Juris. § 1264; *Bovey v. Smith*, 1 Vern. 60; *Armstrong v. Campbell*, 3 Yerg. 201, 236; *Ely v. Wilcox*, 26 Wis. 91; *Bank v. Wilcox*, 24 id. 671; *Kennedy v. Daly*, 1 Sch. & Lef. 379; *Bailey v. Bailey*, 61 Maine, 361; *Schutt v. Lange*, 6 Barb. Ch. 373; *M. Co. v. M. Co.*, 15 Nev. 101; *Saunders v. Deheu*, 2 Vern. 271; *Mumford v. Stohwasser*, L. R. [18 Eq. Cas.] 556; *Allen v. Knight*, 5 Hare, 272; *Newton v. Porter*, 69 N. Y. 133; *N. Bank v. Barry*, 120 Mass. 20; *U. S. Bank v. S. Bank*, 96 U. S. 30; Perry on Trusts, § 218.) The California judgment is not a bar to this action. (*Donohue v. M. Co.*, 66 Cal. 317; *Skidmore v. Morgan*, 3 Abb. [N. C.] 92.) The fact that the plaintiff has not returned, or offered to return, the stock of the California company held by him, does not prevent his suing as a certificate holder. (*Zebley v. F. L. & T. Co.*, 139 N. Y. 469; *Coffin v. G. R. H. Co.*, 136 id. 655.) The Statute of Limitations had not run when the suit was begun. (*Carr v. Thompson*, 87 N. Y. 160; *Bosley v. Nat. M. Co.*, 123 id. 554.) The theory upon which this case is now argued is entirely consistent with the complaint. (*Wetmore v. Porter*, 92 N. Y. 80; *Emery v. Pease*, 20 id. 62; *Mott v. Oppenheimer*, 135 id. 312.)

Frederic R. Coudert for respondent. Plaintiff cannot maintain this suit. (*Milliken v. Whitehouse*, 49 Maine, 527; *Herring v. N. Y., L. E. & W. R. R. Co.*, 105 N. Y. 340; *Stephen v. Fox*, 83 id. 313; *Hastings v. Drew*, 76 id. 9; *Mills v. Stewart*, 41 id. 384; *Bartlett v. Drew*, 57 id. 587; *Rankin v. Elliott*, 16 id. 377, 380; *Hawkins v. Glenn*, 131 U. S. 319; *Thayer v. N. E. L. Co.*, 108 Mass. 523; *Hawes v. A. S. P. Co.*, 101 id. 385; *Hawes v. Oakland*, 104 U. S. 46.)

EARL, J. The complaint in this action covers 158 pages of the printed record, besides the judgment roll in the action of Donohue against the Mariposa Land and Mining Company of California and The Farmers' Loan and Trust Company, which is annexed to the complaint and forms part thereof, and which covers nearly 400 pages more. The facts alleged are so numerous and complicated that it is impracticable to state all or even the substance of them here, and a few only of the most important of them can be presented.

The Mariposa Company is a corporation organized prior to the year 1868, under the laws of this state for the purpose of owning and operating the mining property known as the Mariposa estate situated in California, and consisting of seventy square miles of land. The company had issued coupon bonds secured by a mortgage upon its estate and it owed a floating debt and had issued preferred and common stock. John W. Brumagim held the legal title to the estate which he had acquired for his brother Mark Brumagim at a cost of \$300,000, and the company was in default in the payment of interest upon the mortgage. On the 25th day of April, 1868, John W. Brumagim conveyed the estate to Mark Brumagim and Edward B. Walworth and John J. McEwen, as trustees, and to their successors and assigns forever, subject to the payment to him of the sum of \$300,000, upon certain trusts mentioned in the deed of conveyance, among which were the following: To apply the net proceeds of the mining operations carried on upon the estate to the payment of the

\$300,000, to the payment of dividends at ten per cent per annum upon certificates to be issued by the trustees to an amount not exceeding \$4,000,000, to be known as Mariposa certificates, to the payment of a dividend not to exceed ten per cent per annum upon the preferred stock of the Mariposa Company, to the payment of the principal of the Mariposa certificates under certain conditions, and upon certain contingencies to sell the estate at public auction, and to apply the proceeds of the sale as in the trust deed mentioned, among other things upon the trust certificates, and the preferred and common stock of the company. Walworth resigned as trustee, and the defendant John A. Stewart was appointed in his place. After the 1st day of July, 1868, the holders of the bonds of the Mariposa Company, and its other creditors and its stockholders as provided in the trust deed, to a very large extent, exchanged their bonds, debts and stocks for the Mariposa certificates issued by the trustees, and at the same time paid certain assessments as provided in the trust deed, and in that way trust certificates were issued to the amount of \$4,000,000. The plaintiff, in March and April, 1870, purchased one hundred shares of the preferred stock of the company at the par value of \$100, and trust certificates of the par value of \$10,000. In March, 1871, the Mariposa estate was sold for taxes and purchased for Donohoe and Kelly in the names of five other persons, and title was perfected in them. In June, 1871, the Mariposa Land and Mining Company of New York was organized under the laws of this state with a capital of \$15,000,000, divided into preferred and common stock, for the purpose of taking title to the Mariposa estate. The stock of that company was exchangeable for the trust certificates and for the stocks and bonds of the Mariposa Company upon certain conditions specified, and in November, 1871, the plaintiff surrendered to it his trust certificates and his shares of stock in the Mariposa Company and paid in addition an assessment of \$500, and he received for his certificates, stock and money $247\frac{1}{2}$ shares of stock in the new company, and his holdings of stock in that company amounted

in March, 1873, to 250 shares. The nominal holders of the Mariposa estate under the tax title conveyed the estate to Mark Brumagim, and he subsequently conveyed it to John W. Brumagim. The trustees under the trust deed of 1868 also sold the estate at public auction, and at such sale John W. Brumagim became the purchaser, and he subsequently conveyed the estate to the new corporation upon certain terms and conditions specified. In 1874 the Mariposa Land and Mining Company of California was incorporated under the laws of California with a capital stock of \$15,000,000, and the prior corporation conveyed the Mariposa estate to that corporation. The stock of the New York corporation was exchangeable for the stock of the California corporation, and the plaintiff and other stockholders exchanged their stock in the New York corporation for stock in the California corporation. Subsequently the Mariposa estate owned by the California corporation was sold under judgments and tax sales and purchased for the defendant Donohoe, and title was perfected under such sales, and thereafter the estate was conveyed to the California corporation, and to secure a portion of the purchase price it executed a mortgage upon the estate to Donohoe, and subsequently it also executed a mortgage to the Farmers' Loan and Trust Company to secure the payment of bonds issued by it. Default having been made in the payment of the money secured by the mortgage to Donohoe he commenced an action to foreclose his mortgage, making the Mariposa Land and Mining Company of California and the Farmers' Loan and Trust Company defendants. Those defendants defended that action and it resulted in a decree of foreclosure, and the estate was sold under that decree, and at such sale in August, 1882, was purchased by one Wensinger for Donohoe and Kelly, and he subsequently conveyed the estate to Donohoe, who still later sold it for \$300,000.

Thereafter this action was commenced, and in his complaint the plaintiff alleges that all the dealings of Kelly and Donohoe with the Mariposa estate, during more than twelve years, were fraudulent and intended to injure and defraud the plaintiff

and others similarly situated with him, and his prayer for relief, covering about eighteen printed pages, is, in substance, that all the conveyances, mortgages, judgments, sales and other transactions above mentioned, and many transactions not here mentioned, be declared fraudulent and void and set aside, and that Kelly and Donohue account for the whole estate and all its proceeds.

We must notice particularly the attitude of the plaintiff in this action, and the right in which he presents himself to the court in his complaint. He alleges, in the opening paragraph of his complaint above quoted, that he sues as a stockholder of the Mariposa Land and Mining Company of California; and in a subsequent portion of the complaint he further alleges: "All other stockholders of the Mariposa Land and Mining Company of California, as assignees of and successors to the right, title and interest in and to the said Mariposa estate, originally held by the holders of the Mariposa trust certificates under the said trust deed of April 25, 1868, and of the first preferred stock and other stocks of the defendant, the Mariposa Company, have an interest in common with this plaintiff in the relief sought in this action; but such holders are very numerous and the names of very many of them are unknown to this plaintiff, and they are so many in number that it is impracticable to bring them all before the court in this action or to join them by name as parties hereto; and the plaintiff, therefore, brings this action, not only in his own behalf, but also on behalf of all other stockholders of the said Mariposa Land and Mining Company of California, as assignees of and successors to the aforesaid right, title and interest in and to the said Mariposa estate, similarly situated with this plaintiff who may come in and contribute to the expense of this action;" and in the last paragraph of the complaint preceding the prayer for relief the plaintiff further alleges:

"This plaintiff has not applied to the said defendant corporations, the Mariposa Land and Mining Company of New York and the Mariposa Land and Mining Company of California, nor to the said trustees, to induce them to bring action

to set aside the aforesaid fraudulent contracts and conveyances, nor to remove the cloud on the title to the Mariposa estate caused thereby, nor to compel an accounting by the said Kelly and Donohue for the moneys received by them out of the said estate as hereinabove described, nor to enjoin the further transfer of the alleged title to the said estate, for the reason that the trustees, directors and officers of the said corporations, and a majority of the said trustees, have either been parties to the said fraudulent acts and doings sought to be avoided and set aside, or have been fraudulently or improvidently consenting thereto, and it would be a useless form to request them to take action for the protection and enforcement of the rights of this plaintiff, and of those similarly situated with him; and this plaintiff, and those similarly situated with him, are afraid and unwilling to intrust the conduct of this suit, or of any similar suit, to them, or to any of them whose acts are sought to be impeached, as aforesaid, and should not in equity be compelled so to do."

The complaint contains allegations as to the trust deed of 1868, and the trust certificates issued under that deed, and the claim is therein made that certain acts of Donohue and Kelly mentioned were frauds upon the trustees under that deed and the holders of the trust certificate. But no claim is there made by the plaintiff for relief in his existing right as a *cestui que trust* under the trust deed. But the claim is for relief from those frauds in his capacity as a stockholder of the California company and as such succeeding to the rights he held as *cestui que trust*.

If there is any fair and reasonable uncertainty as to the attitude which the plaintiff meant to assume in his complaint, and whether he meant to postulate his claim for relief upon his position as a stockholder in the California company or as the holder of the trust certificates, that doubt should be resolved against him. A plaintiff should not be permitted to frame his complaint in such ambiguous language as to mislead the opposite party and the court, and then complain that he has been held to one of two possible constructions rather than the other.

Suing as a stockholder the plaintiff's right of action is a derivative one. He sues, not primarily in his own rights, but in right of the corporation. The wrongs of which he complains are wrongs to the corporation. They were not aimed at him and did not involve his personal, individual rights. He suffers as a member of the corporation, and it is the party to sue for and recover damages for the wrongs, or equitable relief against the frauds alleged. The complaint is that all the alleged frauds running through twelve years in the end culminated in final wrong and injury to the corporation, and for relief on account of such wrong and injury a stockholder could only sue in case the corporation upon his demand, or what is equivalent thereto, refused or neglected to sue. (*Hawes v. Oakland*, 104 U. S. 450.) And in such an action any defense which a defendant would have if the corporation itself were the actual plaintiff, may be interposed to bar the stockholder.

The plaintiff is, therefore, estopped by the adjudication in the foreclosure action above mentioned of *Donohue v. The Mariposa Land and Mining Company of California and The Farmers' Loan and Trust Company*. In that action both defendants interposed as a defense substantially the same matters now relied upon by this plaintiff for relief in this action. And in that action substantially the same issues were tried as are presented by the pleadings in this action, and the adjudication then upon all the issues was against the defendants there. The judgment in that action was rendered without any collusion after a real litigation by a court of competent jurisdiction, and no allegations are made against it on account of which a court of equity in a collateral action would have jurisdiction to set it aside. The judgment binds this plaintiff as a stockholder of the California corporation and bars his recovery in this action. (Morowetz on Corporations, § 865; *Stephens v. Fox*, 83 N. Y. 313; *Herring v. N. Y., L. E. & W. R. R. Co.*, 105 id. 340; *Hawkins v. Glenn*, 131 U. S. 319.)

But we may take the most favorable view of the com-

plaint which its phraseology will permit, and that is that the plaintiff stands both upon his rights as a *cestui que trust* under the trust deed of 1868, and his rights as a stockholder in the California corporation, and still the complaint was properly dismissed. He exchanged his trust certificates for stock in the Mariposa Land and Mining Company of New York, and then exchanged that stock for stock in the California company. So long as that exchange stands, he cannot regain his position as a certificate holder. He cannot claim to be both the holder of the certificates and the holder of the stock. It is only by repudiating the exchange as void on the ground of alleged frauds that it is possible for him to regain his position as a certificate holder, and so far as he seeks now to stand upon his right as a stockholder, he actually ratifies and confirms the exchange. He can in no degree assert his right as a stockholder and yet claim the right of a certificate holder, and thus escape the bar of the foreclosure judgment.

But the difficulty with the plaintiff's claim that he may now occupy the position of a certificate holder and thus escape from the bar of the foreclosure judgment is, if possible, still more fundamental. More than twelve years before the commencement of this action, the plaintiff exchanged his trust certificates for the stock of the Mariposa Land and Mining Company of New York, and about eight years before he exchanged that stock for the stock of the California company, and so at the time of the trial of this action he had not, for nearly twenty years, been a holder of any trust certificates, and during all that time he had been a stockholder in one or the other of the two corporations, enjoying whatever advantages that position gave him. He has never surrendered his stock nor demanded the return of his certificates, and he has never rescinded in any legal way the transactions by which his trust certificates were transmuted into stock. He did not offer in his complaint to surrender or give up his stock, and did not even there ask for any rescission of the exchanges mentioned. Even if he was not bound to rescind the transactions claimed to be affected with fraud, and to offer to surrender his stock

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Statement of case.

and demand to be re-instated in his position as a certificate holder before the commencement of this action, or even in his complaint, he was at least bound to do these things at the trial, and there he utterly failed to do them. There he stood upon the allegations contained in his complaint, and the complaint, as we must now assume, was dismissed upon all the grounds which could be made against it.

It is said that the judgment in the foreclosure action can form no bar to the maintenance of this action because Kelly was not a party to that action. But he was a party thereto in interest, and Donohoe stood in that action for both himself and Kelly. That action was prosecuted for Kelly's benefit, and, therefore, he was bound by and also has the benefit of any adjudication made therein.

We are, therefore, of opinion that the complaint was properly dismissed and that the judgment should be affirmed, with costs.

All concur except ANDREWS, Ch. J., and GRAY, J., not voting.

Judgment affirmed.

FREDERICK PALMER, Appellant, v. MARY L. CULBERTSON et al.,
Respondents.

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Plaintiff and the three defendants were the children and only heirs at law of P., who died intestate, owning a farm of 162 acres. In an action for partition defendants claimed that P. in his lifetime conveyed to plaintiff's wife fifty-nine acres, then a part of the farm, three absolutely and the remainder subject to a life estate reserved by the grantor; that such conveyance was intended by P. as an advancement and as and for plaintiff's share in his father's real estate, and was accepted by the wife, with knowledge of such intent, and that plaintiff knew and acquiesced in the conveyance for such purpose. *Held*, that parol evidence was competent to show that said deed was intended as an advancement to plaintiff; also that such an advancement could be made by the conveyance to the wife; but that it was incumbent on defendants to establish by satisfactory evidence that said conveyance was in fact made as an advancement.

The referee found that the value of the fifty-nine acres at the time of said conveyance was one-fourth of the value of the whole farm as the intes-

tate then owned it. Plaintiff's counsel claimed that the value of the life estate should have been deducted to "reach the worth of the property when given" to meet the requirements of the Revised Statutes. (1 R. S. 754, § 25.) *Held*, that the land in which the life estate was reserved must be deemed to have been given at the time of the death of the intestate, when the gift would first vest in possession.

The consideration mentioned in said deed to plaintiff's wife was \$4,720. *Held*, it was to be presumed that this was inserted as the value of the land in the estimation of the parties at the time of the conveyance, and as this sum was undisputedly equal to one-fourth the value of the whole farm at the time of the conveyance, all controversy in respect to value was foreclosed by the statute. (1 R. S. 754, § 25.)

(Argued June 12, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 4, 1892, which affirmed a judgment in favor of defendants entered upon the report of a referee.

This was an action for partition.

Augustus Palmer died intestate in Livingston county in April, 1891, leaving four children, his only heirs at law, the plaintiff and the defendants, Mary L. Culbertson, Cynthia O. Jackson and Addie Palmer. At the time of his death he owned a farm of about 162 acres. In May, 1867, he conveyed to the wife of the plaintiff 59 acres of land, which, with the 162 lying in one body, then constituted his farm. He conveyed three acres of the 59 absolutely and in the remainder he reserved a life estate. Upon the three acres the grantee, at the time of the conveyance, contemplated building a house, and thereafter did build one. About the first day of May, 1891, the plaintiff commenced this action for the partition of the farm of 162 acres, being all the land left by his father, and his three sisters defended the action, alleging that he had no interest in the farm, and that the 59 acres of land conveyed to his wife was so conveyed as an advancement to him and as and for his share in his father's real estate.

The action was referred to a referee and tried before him, and he found that the intestate conveyed the 59 acres to plaintiff's wife and thereby designed and intended to convey

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the same to her as and for the just share of the plaintiff as one of his children in all the real estate then owned by him; that she knew the purpose of the conveyance and accepted it with such knowledge; that the plaintiff also knew such purpose and acquiesced in and assented to the conveyance for such purpose, and the conveyance had in fact no other consideration; that the intestate remained to the time of his death in the possession and use of the land conveyed, except the three acres, and the 59 acres was one-fourth in quantity and value of all the land the intestate then owned, and he ordered judgment for the defendants dismissing the complaint upon the merits. The plaintiff appealed to the General Term from the judgment and from affirmance there to this court.

S. Hubbard for appellant. The whole of the fourth finding of fact is erroneous. There is no evidence to support the same. (Code, § 993; *Todd v. Nelson*, 109 N. Y. 316; *Van Bokkelen v. Berdell*, 130 id. 141; *Halpin v. P. Ins. Co.*, 118 id. 165; *Sickles v. Flannigan*, 79 id. 224, 225; *Duffay v. Masterson*, 44 id. 557, 563; *Pollock v. Pollock*, 71 id. 137, 153; *Wailing v. Toll*, 9 Johns. 141; *Credit v. Brown*, 10 id. 365; *Hopkins v. Smith*, 11 id. 161; *Gildersleeve v. Landon*, 73 N. Y. 609; *Goodyear v. De La Verne*, 10 Hun, 537; *People v. Langdon*, 99 U. S. 578.) The finding is a total departure from the answer. (*Southwick v. F. N. Bank*, 84 N. Y. 420, 428, 429; *Neudecker v. Kohlburg*, 81 id. 296, 301; *Wright v. Delafield*, 25 id. 266; *Day v. Town of New Lots*, 107 id. 149, 154; *Ballou v. Parsons*, 11 Hun, 602; *Truesdell v. Sarles*, 104 N. Y. 165, 167; *Paige v. Willett*, 38 id. 28, 31.) The finding of fact is clearly insufficient to support the conclusion of law or the judgment. (*Bell v. Champlain*, 64 Barb. 397.) The referee erred in refusing to find that said conveyance to Hattie A. Palmer was not made in pursuance of the agreement set forth in the answer, nor of any agreement between plaintiff and deceased that the same should be received as an advancement, etc. (*Freeman v. Freeman*, 43 N. Y. 34; *Sherwood v. Smith*, 23 Conn. 516.)

The referee erred in his refusal to find the agreement of intestate to convey to plaintiff's wife if she would build. (*Knapp v. Hungerford*, 7 Hun, 588; *Freeman v. Freeman*, 43 N. Y. 34; *Van Arsdale v. Perry*, 21 Wkly. Dig. 116; *Cornings v. Wellman*, 14 N. H. 287; *Walker v. Dunsbaugh*, 20 N. Y. 173; *Gibney v. Marchay*, 34 id. 301; *Clark v. Baird*, 9 id. 184; *Terry v. Chandler*, 16 id. 454; *Duffy v. Masterson*, 44 id. 557.)

E. A. Nash for respondent. There is evidence to support the findings of the referee. The fourth finding of fact, which is the basis of the judgment, is to the effect that the conveyance by Augustus Palmer to his daughter-in-law was designed and intended to convey the premises to her as and for the just share and proportion of her husband, the plaintiff, Frederick Palmer, in all of the real estate then owned by the grantor, as one of his children and heirs at law, and that there was no other consideration for the conveyance. That at the time of the conveyance these facts were well known to the plaintiff, who acquiesced in and assented to such conveyance for the purposes for which it was intended by his father. (*Partridge v. Havens*, 10 Paige, 618, 626; *Sanford v. Sanford*, 61 Barb. 293, 299; *Proseus v. McIntyre*, 5 id. 424; *Bell v. Champlain*, 64 id. 396.) The exception to the overruling of the objection to the question put to the witness, Otto Kelsey, who drew the deed from Augustus Palmer to Hattie A. Palmer, is untenable. (*Tooley v. Bacon*, 70 N. Y. 34.)

EARL, J. The learned counsel for the plaintiff claims that there was no evidence sustaining the findings of the referee as to the alleged advancement to the plaintiff. But a careful reading of the evidence satisfies us that there was abundant evidence. The plaintiff within a few days after his father's death admitted to a number of persons who were called as witnesses for the defendants that his share of his father's real estate had been conveyed to his wife, and substantially that he had no interest as heir in the land left by his father. These

admissions by fair implication embrace the purpose for which the conveyance was made and received, and that the plaintiff knew such purpose and acquiesced in the conveyance for that purpose. There is also evidence that the plaintiff consulted the attorney who drew the deed to his wife and was with his father when the deed was drawn, and that the deed was actually delivered to him. All this evidence is rendered very probable and greatly strengthened by the fact that the 59 acres conveyed without any consideration was equal in quantity and value to one-fourth of the real estate then owned by the intestate.

It is quite true, as claimed by the plaintiff's counsel, that so far as reliance is placed upon the admissions of the plaintiff, all that he said in making the admissions must be considered and weighed in determining the force, bearing and extent of the admissions. But all that was said by the plaintiff being considered by the referee, it was for him to draw the inferences and determine what he meant to admit and what the truth as to the facts admitted really was.

It was competent for the defendants to show by parol evidence that the deed was intended as an advancement, and such is the rule in all the states, except a few where by statute a different rule of evidence is prescribed. (4 Kent's Com. 418.)

There can be no doubt that an advancement could be made by the conveyance to his wife. If the conveyance had been made to him, under the circumstances disclosed in this record, it would, without any direct proof, have been presumed to have been made as an advancement. (*Astreen v. Flanagan*, 3 Edw. Ch. 279; *Proseus v. McIntyre*, 5 Barb. 424; *Sanford v. Sanford*, 61 id. 293.) But as the conveyance was made to his wife, it was incumbent upon the defendants to establish, by satisfactory evidence, that it was made to her as an advancement of the plaintiff's share. (*Dilley v. Love*, 61 Md. 603; *Stewart v. Pattison*, 8 Gill [Md.], 46; *Rogers v. Mayer*, 59 Miss. 524; *Rains v. Hays*, 6 Lea [Tenn.], 303.)

It is provided in the Revised Statutes (Part 2, chap. 2, sect. 25) that the value of property advanced "shall be estimated according to the worth of the property when given." The referee found the value of the 59 acres at the time of the conveyance to be equal to one-quarter of the value of the whole farm as the intestate then owned it, and they must have borne the same relative value at the time of the death of the intestate, and such is the effect of all the evidence as to value. The counsel for the plaintiff contends that as the intestate reserved a life estate in all but three acres, the value of such life estate should have been deducted to reach the "worth of the property when given." We think the land in which the life estate was reserved must be deemed to have been given at the time of the death of the intestate when the gift could first vest in possession. Any other construction of the language used in the section would work absurdity and might lead to injustice. On the one hand, if the value of the land is to be estimated as of the date of the conveyance, it might be unjust to a party situated like the plaintiff to take the actual value of the acres conveyed, disregarding the life estate; and on the other hand, it would be unjust to the other children when all the children came into their shares at the same time, to wit, the death of the intestate, to estimate the value of the plaintiff's share diminished by a life estate which had then ceased to exist. The purpose and object of the section require the construction we give to it. But there is a further answer to this claim. In the earlier part of the section it is provided that "the value of any real or personal estate so advanced shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing." The consideration mentioned in the deed to plaintiff's wife, the payment of which is acknowledged, is \$4,720, which is the total of eighty dollars per acre for the 59 acres. We must presume that this sum was inserted in the deed as the value of the land in the estimation of the parties at the time of the conveyance. The wife, in taking the conveyance, stood for the plaintiff. He assented to the conveyance and knew its contents. Her

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acknowledgment of the value must be deemed his acknowledgment, and as the sum mentioned is beyond any dispute equal to one-fourth of the value of the whole farm, as it then existed, all controversy about value is foreclosed by force of the statute.

The defendants were not bound to show that this advancement was made in full of the plaintiff's share in both real and personal estate. Here land alone was in controversy, and it was sufficient for them to show that the advancement was in full of plaintiff's share in the land of his father, leaving him to share with the other children in the personal estate.

We have thus covered all the material points mentioned in the argument on behalf of the plaintiff. Other exceptions taken are not of sufficient importance to need particular attention now.

The judgment should be affirmed, with costs.

All concur, except ANDREWS, Ch. J., not sitting.

Judgment affirmed.

THE PEOPLE ex rel. FREDERICK L. TAYLOR, Appellant, v.
GERRIT A. FORBES, Justice, etc., Respondent.

The provision of the Code of Criminal Procedure (§ 515) abolishing writs of error and certiorari and enacting that judgments and orders in criminal cases and orders in "special proceedings of a criminal nature" may be reviewed only by appeal, does not include proceedings to punish for a criminal contempt. The "special proceedings of a criminal nature" referred to are those designated as such in said Code.

An order, therefore, made in proceedings to punish for a criminal contempt may be reviewed by certiorari.

The constitutional and statutory provisions (U. S. Const. art. 5; State Const. art. 1, § 6; Code Civ. Pro. § 887; Code Crim. Pro. § 10), declaring that no person shall be compelled to testify against himself in any criminal case, protects a person called as a witness in any judicial or other proceeding against himself, or upon the trial of issues between others, from being compelled to disclose facts or circumstances that can be used against him as admissions tending to prove his connection with any criminal offense of which he may then or thereafter be charged, or

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the sources from or the means by which evidence of its commission or of his connection with it may be obtained. Nothing short of absolute immunity from prosecution can take the place of the privilege so given.

The witness is himself in such a case the judge as to the effect of answers sought to be drawn from him, and if to his mind it may constitute a link in the chain of evidence sufficient to convict him or put him in jeopardy, if other facts are shown, he may remain silent, unless it be perfectly clear that he is mistaken and that the answer cannot possibly injure him, or tend in any way to subject him to the peril of prosecution.

While the students belonging to one of the classes of C. University were holding a banquet, a poisonous gas was injected by some persons, presumed to be other students, into the dining hall and adjoining kitchen, which caused the death of one person and seriously affected many others. The grand jury instituted an inquiry to ascertain who were the guilty persons, and the relator was subpoenaed before it as a witness. After he had testified that he had no connection whatever with the transaction, he stated that he and his room mate had taken a course in chemistry, and were familiar with the methods of generating the gas used. Various questions were then asked him for the purpose of ascertaining who placed the jugs, in which the gas was generated, in the room under the dining hall, among others, if he knew where the jugs were purchased, who purchased them, when purchased and to whom delivered after they were purchased. These questions he declined to answer on the ground that they would tend to criminate him. It appeared that the relator boarded in the house from whence the jugs were taken and his room mate was one of the persons suspected. In proceedings to punish for contempt in refusing to answer said questions, *held*, that the case came within the said constitutional and statutory provisions; that the relator did not waive his right by testifying that he had no connection with the transaction; and so, that an order adjudging the relator guilty of contempt in refusing to answer was error.

People ex rel. Taylor v. Forbes (77 Hun, 612), reversed.

(Argued June 21, 1894; decided October 9, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made April 24, 1894, which dismissed a writ of certiorari issued upon application of the relator.

The relator was convicted of a criminal contempt in refusing to answer questions while testifying before the grand jury, and was committed for such contempt.

The facts, so far as material, are stated in the opinion.

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Frederick Collin for appellant. The writ of certiorari to review, applied for and issued under sections 2120, *et seq.*, of the Code of Civil Procedure, was the proper remedy, and by it the proceedings were properly before the General Term, and by the appeal are properly before this court. (Code Civ. Pro. §§ 8, 9, 2148; Code Crim. Pro. §§ 515, 619.) This court will look into the record for the purpose of seeing whether the Court of Oyer and Terminer kept within its jurisdiction, based its decisions upon legal proof of facts authorizing it, and violated no rule of law in its proceeding affecting the relator. (Code Civ. Pro. § 2140; *People ex rel. v. French*, 92 N. Y. 306; *People ex rel. v. French*, 123 id. 636.) It is clear that the death of Henrietta Jackson and the injuries to the banqueters may have resulted from acts which are crimes. They may be murder in the first degree. (Penal Code, §§ 183, 193, 218, 219, 448.) No person is compelled to be a witness against himself. (Code Crim. Pro. § 10; Code Civ. Pro. § 37.) Such constitutional and statutory provisions must be most broadly and liberally construed as an immunity or privilege to a witness. (*Boyd v. United States*, 116 U. S. 616; *Counselman v. Hitchcock*, 142 id. 547; *Emery's Case*, 107 Mass. 172; Code Civ. Pro. § 837; *State v. Newell*, 58 N. H. 314; *Ex parte Boscowitz*, 84 Ala. 463; *Minters v. People*, 139 Ill. 363; *Temple v. Comm.*, 75 Va. 892; *Printz v. Cheeney*, 11 Iowa, 469; *Coates v. Hardacre*, 3 Taunt. 424; *People v. Mather*, 4 Wend. 230; 2 Phillips on Ev. 930; 1 Greenl. on Ev. § 451; *State v. S. H. Co.*, 109 Mo. 118; *Stevens v. State*, 50 Kans. 712; *In re Nickell*, 47 id. 712; *Warner v. Lucas*, 10 Ohio, 337; *People v. Brewer*, 27 Mich. 134; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 417; 1 Burr's Tr. 245; *Fellows v. Wilson*, 31 Barb. 162; *People v. Hackley*, 24 N. Y. 74; *People v. Sharp*, 107 id. 427.) The relator, by answering certain questions against which he might have claimed his privilege, did not waive his right to claim it as he did. (*Regina v. Garbett*, 1 Den. Cr. Cas. 241; *Chesapeake Club v. State*, 63 Md. 446; *Temple v. Com.*, 75 Va. 892.) The relator was entitled to his privilege, and was

not guilty of contempt. That the relator cannot be indicted for anything which is found out does not affect relator's right. (*People v. Mondon*, 103 N. Y. 211; *People v. Chaplean*, 121 id. 266; *Temple v. Com.*, 75 Va. 892.) The adjudication against and the punishment of the relator were extra-jurisdictional and void. (Code Civ. Pro. § 70; *In re Eldridge*, 82 N. Y. 161; *People v. Hackley*, 24 id. 74; *In re Savin*, 131 U. S. 267; *In re Judson*, 3 Blatchf. 148; *State v. Henthorn*, 46 Kans. 613; *Ex parte Wright*, 65 Ind. 504; *Stuart v. Allen*, 45 Wis. 158; *In re Smethurst*, 2 Sandf. 724; *Gundy v. State*, 13 Neb. 445.)

S. D. Halliday for respondent. This appeal and all the proceedings herein should be dismissed upon the ground that this matter cannot be reviewed by a writ of certiorari, and the writ should not have been issued in the first instance. (*People v. Palmer*, 109 N. Y. 413; *Laws of 1884*, chap. 372; *People ex rel. v. Carney*, 29 Hun, 47; *People v. Gilmore*, 88 N. Y. 626; Code Civ. Pro. §§ 514, 963, 3355, 3356.) In every case the question whether the answers to the question will or will not criminate, is purely a question of fact to be determined by the court. (*Byass v. Smith*, 4 Bosw. 679.) The question on this review now is, whether that finding of fact shall be disturbed. The Supreme Court at General Term did not disturb that finding, and it should not be disturbed in this court unless it is entirely lacking in evidence to sustain it, or so lacking such evidence as to raise purely a question of law. (*Musgrave v. Buckley*, 24 N. Y. S. R. 74; *Coffin v. Hollister*, 36 id. 271; *Smith v. Pettee*, 70 N. Y. 13; *Youngs v. Youngs*, 5 Redf. 518; *People v. Hackley*, 24 N. Y. 74.)

O'BRIEN, J. The relator was adjudged guilty of contempt by the justice presiding at a Court of Oyer and Terminer held at Ithaca in March, 1894, for refusing to answer certain questions propounded to him as a witness before the grand jury. The General Term, upon certiorari, has affirmed the determination.

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Opinion of the Court, per O'BRIEN, J.

At the outset the objection is made by the learned counsel for the respondent that the order is not reviewable. This position is based upon the language of § 515 of the Code of Criminal Procedure, as amended by chapter 372 of the Laws of 1884, abolishing writs of error and certiorari, and enacting that judgments and orders in criminal cases and orders in special proceedings of a criminal nature may be reviewed only by appeal. But we think that the "special proceedings of a criminal nature," referred to in this section, are those designated as such in that Code; that is, the various special proceedings enumerated and provided for in part sixth of the Code of Criminal Procedure. By section 962, that Code applies to criminal actions and to all other proceedings in criminal cases which are *therein provided for*. Proceedings for contempt are not provided for in that Code, nor is a criminal contempt there defined, or the punishment therefor prescribed, except in § 619, which refers to cases of disobedience to process and refusal to answer as a witness; and in these cases the remedy is referred to the procedure prescribed in civil cases provided for in the Code of Civil Procedure. The offense of which the relator was convicted is created and the procedure and punishment prescribed by sections eight and nine of this Code, and the manner of reviewing the determination is to be found there. (§ 2148.) This section clearly contemplates that an order made in contempt proceedings may be reviewed by certiorari, and such has always been the practice. (*People ex rel. Munsell v. The Court of Oyer and Terminer*, 101 N. Y. 245; *People ex rel. Choate v. Barrett*, 56 Hun, 351; *S. C.*, 121 N. Y. 678; *People ex rel. Negus v. Dwyer*, 90 id. 402.) It was not intended that any change should be made in the practice in such cases by the amendment to § 515 of the Code of Criminal Procedure. Full force is given to the language of that section by confining it to such actions and special proceedings as are defined and regulated by that Code; and as no provision is there made for proceedings to punish for contempt or to review any order made in such proceedings, the practice is governed by the

same procedure as applies to ordinary cases where private rights are involved, the determination to which may be reviewed by means of the writ of certiorari; and so, we think, that the record is properly before us for review. The merits of the case, or the power of the court to punish the relator for contempt, upon the facts and circumstances disclosed, must, therefore, be considered.

The case grew out of the conduct of certain of the students at Cornell University on the 20th of February, 1894. That was the date of the customary annual banquet by the freshman class of the college. It is supposed, and is perhaps a fair inference from what appears in the record, that other students at the college, and especially those of the sophomore class, conspired to disturb the banquet by a new form of that species of annoyance or outrage popularly known as "hazing," which constitutes such a great reproach to college life, and is so disgraceful to all who participate in it. During the evening, while the banquet was in progress, a quantity of chlorine gas, of such poisonous power, was injected into the dining hall and the adjoining kitchen, that it caused the death of a colored servant in the kitchen, and many of the students attending the banquet were also seriously affected by it. The result was produced by placing two jugs in a room just below the banqueting rooms, containing the essential chemicals and substances for the generation of the gas, which was conducted into the kitchen and dining hall above by means of a rubber tube, fastened over the mouth of each jug, and passing upward through holes for that purpose bored in the ceiling and floor above. The act was of such an unusual and peculiar nature, and it was followed by such serious consequences, that public sentiment demanded the detection and punishment of its authors and perpetrators. The grand jury was instructed by the court to institute an inquiry with the view of ascertaining the person or persons responsible for the offense, and the relator was subpoenaed before them as a witness. The district attorney appeared before them and participated in the examination of the witnesses, and, during the investigation,

the questions which the relator declined to answer were propounded to him. The court convicted the relator summarily as for contempt "committed in the immediate view and presence of the court," upon the statement as to what occurred in the grand jury room by the district attorney and without any further judicial inquiry as to the facts. The record contains that part of the examination of the relator before the grand jury wherein the alleged contempt was committed. It discloses the fact that the witness was pressed by the district attorney to answer the questions, and having been brought before the court during the progress of the examination, was in substance instructed that the questions were of such a character that he was, under the circumstances, bound to answer. He testified in the broadest terms, in reply to questions propounded to him, that he had no connection whatever with the transaction, on the evening of the banquet, and which was the subject of the inquiry. These questions were general and so framed that he could easily see their bearing and tendency. They gave him an opportunity to deny in general terms that he was the author and perpetrator of the offense or in any way connected with it, but when questioned as to particular facts and circumstances, he refused to answer. The order of commitment contains upon its face a statement of the proceedings in the grand jury room which constituted the contempt of which the witness was convicted. From that it appears that the relator refused to answer questions framed evidently for the purpose of ascertaining the person or persons who placed the jugs in which the gas was generated in the room under the dining hall. He was asked if he knew where the jugs were purchased, who purchased them, when purchased and to whom they were delivered after they were purchased. These questions were framed in various forms and sometimes repeated. After testifying that he was a student at the university, that his home was in New Jersey, that he boarded at No. 6 Cook street in Ithaca, he was asked who his room mate was. He

then stated to the district attorney: "I wish to throw myself upon the privilege which the law allows me and decline to give evidence, on the ground that it may tend to criminate me." He was then asked the following question: "Do you say that it will tend to criminate you to state who your room mate is?" His only reply was: "I wish to throw myself upon my privilege and decline to give evidence, on the ground that my answer may tend to criminate me." The witness was then brought into court, and after consultation with the presiding judge he returned to the grand jury room and testified that his room mate then and since he came to college was Carl Dingens, that both of them had taken a course in chemistry, and, substantially, that they were familiar with the methods of generating chlorine gas. Other questions having more or less relation to the transaction, on the evening of the banquet, was asked and answered, but none of them gave the information sought to be obtained by the questions before referred to, which he declined to answer. On a report of these facts to the court by the district attorney an order was directed to be entered whereby the relator was adjudged guilty of contempt for refusing to answer, and that for such contempt he be imprisoned in the county jail until purged of the same, not exceeding thirty days.

The broad question thus presented upon these facts is whether the relator was in fact guilty of such conduct as subjected him to the power of the court to punish for contempt, or simply exercised a right secured to him by law. It must be assumed that the act by means of which a deadly gas was conducted into the rooms above, resulting in the loss of life, was of such a character and perpetrated with such intent as to subject the author, or any one who aided or assisted, to criminal punishment. The relator, though in fact he may be innocent, was so situated with reference to it, and so related to the circumstances and results, that it is apparent that at some point and in some way it became, under all the circumstances, not only prudent, but necessary and proper, to claim the privilege of refusing to disclose the information sought to be

elicited by the questions. He was a student in the college. He belonged to the sophomore class and the class in chemistry. He boarded at the house from which the jugs were taken by some one. His room mate, at least, seems to have been one of the persons suspected as being in some way connected with the transaction. He was so surrounded by elements of circumstantial proof that the answer to any of the questions might form a link in the chain sufficient to subject him to the hazard of a trial upon a criminal charge. Whether innocent or not, there was a combination of facts and circumstances that brought him perilously close to the charge which was the subject of investigation, and the answer which he was required to give might have completed the chain of proof. He was thus placed in a position where he might lawfully claim the protection of the law and remain silent.

After the Constitution of the United States had been adopted, it was deemed important to add to it several amendments, and one of them (Art. 5) provides, among other things, that no person "shall be compelled, in any criminal case, to be a witness against himself." It was also incorporated into the Constitution of this State (Art. 1, § 6) and more recently into the Code of Civil and Criminal Procedure (Code Civil Pro. § 37; Code Crim. Pro. § 10). These constitutional and statutory provisions have long been regarded as safeguards of civil liberty, quite as sacred and important as the privileges of the writ of habeas corpus or any of the other fundamental guaranties for the protection of personal rights.

When a proper case arises they should be applied in a broad and liberal spirit in order to secure to the citizen that immunity from every species of self-accusation implied in the brief but **comprehensive** language in which they are expressed. The security which they afford to all citizens against the zeal of the public prosecutor, or public clamor for the punishment of crime, should not be impaired by any narrow or technical views in their application to such a state of facts as appears from the record before us. The right of a witness to claim the benefit of these provisions has frequently been the subject

of adjudication in both the Federal and state courts. The principle established by these decisions is that no one shall be compelled in any judicial or other proceeding against himself, or upon the trial of issues between others, to disclose facts or circumstances that can be used against him as admissions tending to prove his guilt or connection with any criminal offense of which he may then or afterwards be charged, or the sources from which or the means by which evidence of its commission or of his connection with it may be obtained. The cases cover the point so completely that no comment or explanation is necessary, and it would not be useful to quote at much length from the language in which the decisions are expressed. It will be quite sufficient for every purpose of the opinion to note where they may be found. (*Counselman v. Hitchcock*, 142 U. S. 547; *Emery Case*, 107 Mass. 172; *State v. Nowell*, 58 N. H. 314; *Ex parte Boscowitz*, 84 Ala. 463; *Minters v. People*, 139 Ill. 363; *Temple v. Commonwealth*, 75 Va. 892; *Printz v. Cheeney*, 11 Iowa, 469; *People v. Mather*, 4 Wend. 230; *People v. Hackley*, 24 N. Y. 84; *People v. Sharp*, 107 id. 427; 1 Burr's Trial, 245.) The question was fully discussed at an early day by Chief Justice MARSHALL on the trial of Aaron Burr, and every phase of it so completely explained and exhausted that his views were followed in the subsequent decisions. A single quotation from the language used will illustrate the scope and extent of the immunity which the witness can lawfully claim: "Many links frequently compose that chain of testimony which is necessary to convict an individual of a crime. It appears to the court to be the true sense of the rule that no witness is compelled to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness by disclosing a single fact may complete the testimony against himself and to a very effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself would be unavailing, but all other facts without it would be insufficient. While that remains concealed in his

own bosom he is safe, but draw it from thence and he is exposed to a prosecution. The rule that declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. * * *

All the leading authorities were elaborately reviewed in the recent case of *Counselman v. Hitchcock* (*supra*) in the Supreme Court of the United States. In that case the grand jury was engaged in the investigation of certain alleged offenses by railroad companies against the recent act of Congress for the regulation of interstate commerce, and the witness, a commission merchant and dealer in grain, refused to answer certain questions as to the tariff of rates allowed to him by some of the railroads, on the ground that it might tend to criminate him. The case in all its essential features was similar to this, and the court, sustaining the privilege contended for in behalf of the witness, held that the object of the constitutional provision was to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime, and that its meaning was that a witness is protected from any compulsory disclosure of the circumstances of his offense, or the source from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him. This conclusion was reached, although there is a general Federal statute providing that in such cases the testimony given by the witness at the investigation shall not be given in evidence against him, subsequently, in any civil or criminal proceeding. (U. S. R. S. § 860.) It seems that in such cases nothing short of absolute immunity from prosecution can take the place of the privilege by which the law affords protection to the witness. The testimony which the relator voluntarily gave before the grand jury, in general terms exonerating himself from all connection with the transaction, seems to have had great weight with the learned trial judge. It was argued that the relator

could not possibly be put in peril by his answer to the question, since he had already testified that he had no connection with the transaction. But this conclusion was not warranted by the facts. The testimony of the witness might be ever so strong and clear in favor of his innocence, but it did not conclude the public prosecutor, in the absence of some constitutional or statutory provision securing the relator from prosecution. The general statements of a person charged with crime in regard to his innocence avail but little against incriminating facts and circumstances. His protestations of innocence and his broad general denial of any knowledge of or connection with the transaction might be overcome by facts and circumstances, if the district attorney could be permitted to draw them from the witness. Any one who has had much experience in the conduct of criminal trials is aware of the fact that, frequently, the most dangerous proof that a person charged with crime has to meet, are his own statements made for the purpose of warding off suspicion or of satisfying others with regard to his innocence. It is not unusual on such trials to confront the accused with his own declarations made for the very purpose of exonerating himself from all suspicion, but which, when all the evidence is collected, are so far at war with all the facts and circumstances as to furnish evidence of guilt. The witness, by answering the general questions as to his connection with the affair, whether his answers were true or false, did not waive his right to remain silent when it was sought to draw from him some fact or circumstance which in his judgment might form another link in the chain of facts and capable of being used under any circumstances to his detriment or peril. The circumstances relating to the purchase of the jugs and the means employed to place them under the banquet room were important as furnishing a clue that might lead to the identification of the guilty person or persons, and the witness was or appeared to be so related to the transaction that he might lawfully refuse to furnish the same, notwithstanding his general statements to the effect that he had nothing whatever to do with them. The witness who

knows what the court does not know, and what he cannot disclose without accusing himself, must in such cases judge for himself as to the effect of his answer, and if, to his mind, it may constitute a link in the chain of testimony, sufficient to convict him, when other facts are shown, or to put him in jeopardy, or subject him to the hazard of a criminal charge, indictment or trial, he may remain silent. While the guilty may use the privilege as a shield it may be the main protection of the innocent, since it is quite conceivable that a person may be placed in such circumstances, connected with the commission of a criminal offense, that if required to disclose other facts within his knowledge he might, though innocent, be looked upon as the guilty party. (*Adams v. Lloyd*, 3 H. & N. 363.)

But it is urged that the relator made use of the privilege, not in good faith, for his own protection from any peril, actual or apprehended, but as a pretext for shielding his friends or associates, and that the facts and circumstances before the learned judge presiding at the Oyer and Terminer were of such a nature as to warrant him in so deciding as a matter of fact, and that such finding is not reviewable here. The weight of authority seems to be in favor of the rule that the witness may be compelled to answer when he contumaciously refuses, or when it is perfectly clear and plain that he is mistaken, and that the answer cannot possibly injure him, or tend in any degree to subject him to the peril of prosecution. But the courts have recognized the impossibility in most cases of anticipating the effect of the answer. Where it is not so perfectly evident and manifest that the answer called for cannot incriminate, as to preclude all reasonable doubt or fair argument, the privilege must be recognized and protected. (*Janvrin v. Scammon*, 29 N. H. 280.) In this case, however, considering the relation of the witness to the subject of the inquiry, and the character and scope of the questions, such a conclusion was not possible. There is no evidence in the record that can, in any reasonable view, sustain such a finding. Our conclusion is that the relator was not guilty of con-

tempt in refusing to answer the questions, and this renders it unnecessary to consider the question whether the witness was in the immediate presence and view of the court so as to authorize it to proceed summarily.

The order of the General Term and the determination of the Court of Oyer and Terminer should be reversed and the relator discharged.

All concur, except ANDREWS, Ch. J., not sitting, and FINCH, J., not voting.

Ordered accordingly.

AUGUSTUS W. BLAZO, Respondent, v. WILLIAM P. GILL,
Appellant.

The parties entered into a contract by which plaintiff agreed to supervise and build a house for defendant, to contract for the work and charge everything at the exact cost, for which he was to furnish vouchers. In an action to recover a balance alleged to be due for moneys paid out by plaintiff for work and materials, it appeared that plaintiff rendered a statement to defendant of moneys expended, accompanied by the vouchers therefor, and upon the trial he proved the expenditure of all the moneys claimed. *Held*, that the evidence was sufficient to sustain a recovery; that plaintiff acted as agent for defendant, and as such was bound simply to act in good faith and in the usual way in making expenditures; that it was not necessary for him to show that all the materials charged were actually used in the building, but the vouchers were sufficient *prima facie* evidence, and as to the labor, it was sufficient for him to show, as was shown, that he employed men upon the building under foremen who kept their time, and that he made payments according to the time thus kept.

Reported below, 69 Hun, 69.

(Argued June 13, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 27, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This was an action upon a contract.

The facts, so far as material, are stated in the opinion.

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Opinion of the Court, per EARL, J.

George G. Reynolds for appellant.*Josiah T. Marean* for respondent.

EARL, J. The plaintiff was a practical builder, and the defendant, desiring to build a dwelling house, in August, 1888, entered into a written contract with him as follows:

"In consideration of the sum of one dollar (\$1.00) to me in hand paid, the receipt of which is hereby acknowledged, and a further sum of one thousand (\$1,000) to be paid on the completion of the house herein described, I agree to supervise, build, finish and complete the house as per the plans annexed, signed and delivered, bearing even date with this, and according to the specification as per memo. attached. I will contract for the building of the said house in all its details with the greatest economy and charge everything at the exact cost for which I will get vouchers, and I further agree that I will give my best attention to the construction of the same in conference with Mr. A. Korber. Mr. Gill agrees to give in addition to each, Mr. Korber and Mr. A. Blazo, a further independent sum of five hundred dollars (\$500.00) each, on completion of the said house."

According to estimates made at the time it was supposed the house would cost about \$16,000. The plaintiff acting as agent for the defendant under the contract employed men and purchased materials and completed the house at a cost of several thousand dollars more than the estimates, and he claims that there is due him a balance of about \$2,000 for moneys paid by him for work and materials. The defendant disputes the amount demanded by the plaintiff, claiming that all the work and materials for which the plaintiff claims reimbursement did not go into the building.

Before the commencement of this action the plaintiff rendered to the defendant a statement of all the moneys expended by him upon the building with the particulars thereof and the vouchers showing such payments, and upon the trial he proved the expenditure of all the money claimed by him, showing a balance of about \$2,000 due him. He did

not, however, prove the actual rendition of all the work and delivery of the materials for which he paid. His contention is that he acted as agent for the defendant, and that it was sufficient for him to show that he employed men and purchased materials in the usual way without showing the actual number of days each man worked, and that the materials purchased by him were actually placed in the building. The contention of the defendant is that the plaintiff was bound to make proof of all the work done upon the building and materials furnished as if his action were to recover directly for such work and materials.

We think the proof of the plaintiff's claim was sufficient. He was the agent of the defendant, and as such bound to act in good faith and in the usual way in making his expenditures. He could order materials, and when the bills therefor were rendered, standing for the defendant and doing as he would have done, he could pay for them upon evidence satisfactory to him that the materials had been delivered, taking proper vouchers for such payments; and upon the trial the vouchers thus taken and rendered to the defendant were sufficient *prima facie* evidence of such payments, and the plaintiff was not obliged to furnish common-law evidence that every cartload of brick, stone or lumber was actually delivered at and used in the building. And as to the labor it was sufficient for him to show that he employed men upon the building under foremen who kept their time, and that he made payments according to the time thus kept. Any other rule would place an agent disbursing money for his principal in an embarrassing position, and would be impractical. It is plain that as to payments by the plaintiff all the contract between the parties contemplated was that he should take vouchers therefor, and present them to the defendant. He did not complain at any time that the plaintiff did not furnish proper vouchers for any of the payments made by him. His sole claim was that he was not satisfied that he had had the benefit of all the labor and materials paid for by the plaintiff. He had been presented with the vouchers and the items of the plaintiff's claim, and yet upon the trial he was not able to

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show that a single item was improper or that the plaintiff did not in good faith pay every dollar for which he claimed reimbursement.

The judgment should be affirmed, with costs.

All concur, except ANDREWS, Ch. J., not sitting.

Judgment affirmed.

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ESTHER Y. McCARTHY, Respondent, v. EUGENE McCARTHY, Appellant.

While the uncorroborated evidence of prostitutes alone is insufficient to sustain a charge of adultery in an action for divorce, yet slight corroboration is sufficient where the defendant fails to take the stand in his own behalf.

In an action by a wife for divorce on the ground of adultery, where the case is litigated, it is not incumbent upon the plaintiff to make affirmative proof of the allegations inserted in her complaint in compliance with the rules of the Supreme Court (Rule 73), *i. e.*, that the adultery charged was "without the consent, privity or procurement of the plaintiff," and that the latter has not voluntarily cohabited with defendant since discovery of the fact; these are matters of affirmative defense. It is only to provide for a case of defendant suffering a default that these possible defenses are required to be negated by plaintiff by verified complaint or affidavit.

Where, in such an action, the charges of adultery in the complaint are put in issue by the answer, and counter allegations of adultery on the part of plaintiff are made and the issues are tried together, the reception of testimony of the plaintiff, incompetent under the Code of Civil Procedure (§ 831) as to the issues presented upon the charges in the complaint, but which is competent upon the issues presented by the counter charges in the answer, is not error.

It is within the discretion of the court in such an action brought by the wife to provide that alimony shall be paid from the time of the commencement of the action.

(Argued June 14, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 7, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This was an action for divorce on the ground of adultery. The facts, so far as material, are stated in the opinion.

Opinion of the Court, per BARTLETT, J.

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T. K. Fuller for appellant. The motion to non-suit should have been granted. (Code Civ. Pro. § 1758.) Divorces are not granted on the evidence of prostitutes and private detectives, unless corroborated. (*Moller v. Moller*, 115 N. Y. 466.) If both are guilty neither can have a divorce. (Code Civ. Pro. § 1758.) The allowance of alimony relates to the future, not to the past. (Code Civ. Pro. § 1769; *Beadleston v. Beadleston*, 103 N. Y. 402; *Romaine v. Chauncey*, 129 id. 566; *Forrest v. Forrest*, 25 id. 501.)

Louis Marshall for respondent. Defendant's adultery with Marion Ronpe and with Rachel Cuiseneer is proven. (*Moller v. Moller*, 115 N. Y. 466; *Gulerette v. McKinley*, 27 Hun, 322.) Plaintiff is innocent of adultery. (*Westerlo v. Dewitt*, 36 N. Y. 340; *Steffens v. Steffens*, 3 N. Y. S. R. 643; *Sherwood v. Hauser*, 94 N. Y. 626; *Baird v. Mayor, etc.*, 96 id. 567; *Allen v. Allen*, 101 id. 628; *Conger v. Conger*, 82 id. 602; *Pollock v. Pollock*, 71 id. 137.) There was no error in admission of evidence. (*Quincey v. Young*, 5 Daly, 327.) The allowance of \$500 per year alimony from the date of the commencement of the action was proper and was not excessive. (*Romaine v. Chauncey*, 129 N. Y. 566; 1 Bishop on Married Women, § 887; 1 Bishop on Mar., Div. & Sep. § 1215; *Niel v. Johnson*, 11 Ala. 615; *Harris v. Harris*, 31 Grat. 13; *Haley v. Baninster*, 4 Madd. 275; *Pretzinger v. Pretzinger*, 45 Ohio St. 452; *Wilson v. Wilson*, 43 Cal. 399; Code Civ. Pro. § 1759; *Muse v. Muse*, 84 N. C. 35; *Kamp v. Kamp*, 59 N. Y. 212; *Erkenbrack v. Erkenbrack*, 96 id. 456.) Alimony was properly allowed from the date of the commencement of the action. (*Burr v. Burr*, 7 Hill, 207; *Forrest v. Forrest*, 25 N. Y. 518; Bishop on Mar. & Div. § 651; *Stamford v. Stamford*, 1 Edw. Ch. 316.)

BARTLETT, J. This is an appeal from the judgment of the General Term, fourth department, affirming the judgment of the Onondaga County Special Term, entered upon the report of a referee, granting the plaintiff an absolute divorce from the defendant, and awarding her the custody of the only child

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of the marriage. The order confirming the report of the referee and directing judgment against defendant authorized the referee to take evidence and certify the same to the court with his opinion as to what sum should be paid by the defendant to the plaintiff for the education and maintenance of the child and the support of the plaintiff. The referee heard witnesses at length, and reported to the court, as his opinion, that the defendant should pay for the purposes indicated in the order of reference the annual sum of five hundred dollars, and that such payment should commence from the date this action was instituted. The report of the referee was confirmed and the final judgment provides for the payment of the sum suggested. The appellant seeks to review upon this appeal not only the main issues in the case, but the question of permanent alimony.

The defendant in his answer set up counter charges of adultery against his wife, and the issues thus presented by the pleadings were litigated in a bitter and protracted manner before the referee, who, upon conflicting evidence, found the plaintiff not guilty of the charge of adultery made by her husband, and upon evidence, substantially uncontradicted, found the defendant guilty.

The learned counsel for the defendant insists, with great earnestness, that the evidence warranted a judgment against the wife, and that the judgment condemning the husband ought not to stand as it rests on the uncorroborated evidence of prostitutes; and for the further reason that when plaintiff rested her case she had not proved that the alleged acts of defendant's adultery had been committed without her consent, connivance, privity or procurement; and that she had not voluntarily cohabited with the defendant since knowledge of the facts. It may be observed in passing that the defendant's counsel requested the referee to find that there was no sufficient proof of adultery on the part of either plaintiff or defendant in this action, and that the referee so found as to the plaintiff and refused so to find as to defendant.

As to the first contention, that the evidence warranted a

judgment against the plaintiff, it is sufficient to say that the referee found on this point, and the General Term affirmed, upon conflicting evidence, and this court is bound by the findings below. As to the suggestion that the case against the defendant rests on the uncorroborated evidence of prostitutes, we are of opinion that as to the charge sought to be proved that the defendant, in the absence of his wife, took two abandoned women to his residence and passed the night with one of them in his marriage bed, was sufficiently corroborated by surrounding circumstances to warrant the finding of the referee.

As to the charges of adultery sought to be proved in the cities of Binghamton and Auburn in this state, we think there is sufficient corroboration in the letters of the defendant addressed to the co-respondent. Slight corroboration as to both charges is sufficient in view of the fact that the defendant failed to take the stand in his own behalf.

The views we now express are in harmony with the rule laid down in *Moller v. Moller* (115 N. Y. 466), cited by defendant's counsel.

We will now consider the point that the motion to non-suit the plaintiff, made at the time she rested her case, should have been granted on the ground that under the final ruling of the referee on questions reserved, it did not appear that the defendant's acts of adultery were without her connivance, and that she had not cohabited with him after knowledge of the facts.

The plaintiff was allowed to furnish this proof in her own testimony, which was objected to as incompetent under section 831 of the Code of Civil Procedure, and subsequently stricken out by the referee. We, therefore, have presented in this case the question whether, in a litigated case, it is incumbent upon the plaintiff to make affirmative proof of the usual allegations inserted in a complaint for absolute divorce to the effect that the adultery of defendant was committed without the connivance, etc., of plaintiff, and that plaintiff has not voluntarily cohabited with the defendant, etc.

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We are of opinion that the provisions of the Code of Civil Procedure and rule 73 of the Supreme Court, when read together, do not require the plaintiff to make such proof as a part of his *prima facie* case in contested actions. The allegations referred to are inserted in the complaint in order to comply with the provisions of rule 73 in case defendant makes default.

Rule 73 reads as follows, viz.: "And when the action is for a divorce on the ground of adultery, unless it is averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff; that five years have not elapsed since the discovery of the fact that such adultery has been committed, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery, and also where at the time of the offense charged, the defendant was living in adulterous intercourse with the person with whom the offense is alleged to have been committed, that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff, and the complaint containing such averments be verified by the oath of the plaintiff, in the manner prescribed by the Code, judgment shall not be rendered for the relief demanded, until the plaintiff's affidavit be produced, stating the above facts, and in case of a reference the plaintiff shall be specifically examined on oath as to each of these particulars."

It is to avoid the necessity for the affidavit in case of default that the allegations referred to in the rule are inserted in the complaint. As to the proof of the material allegations of the complaint in case of default, the subject is dealt with by section 1757 of the Code of Civil Procedure which provides that if the defendant makes default in appearing or pleading, the plaintiff, before he is entitled to judgment, must nevertheless satisfactorily prove the material allegations of his complaint.

Section 1758 of the Code of Civil Procedure provides that in either of the cases therein named the plaintiff is not entitled to a divorce, although the adultery is established; it

then names the various grounds set forth in rule 73 as already quoted.

It is obvious from reading the two sections of the Code referred to and rule 73, that the grounds set forth in section 1758 are matters of affirmative defense in a case that is litigated, but in the event of defendant suffering a default the plaintiff cannot obtain judgment without negating those possible defenses by his sworn complaint or affidavit. It is further insisted by defendant's counsel that this case is filled with reversible error and we are cited, without further comment, to many folios of the case as sustaining the statement. We have examined this record with care and are of opinion there are no erroneous rulings which should lead to the reversal of this judgment. The most important of defendant's exceptions were taken during the examination of plaintiff, it being insisted that much of her testimony was incompetent under section 831 of the Code. It must be kept in mind that two distinct issues were being tried simultaneously before the referee, to wit, the charges of plaintiff and the countercharges of defendant. We have recently had occasion to comment upon the inherent difficulty of ruling upon an offer of evidence when it is competent as to one issue, and incompetent as to the other. (*Woodrick v. Woodrick*, 141 N. Y. 457, at page 462.) Testimony competent on either issue must be admitted. (*De Meli v. De Meli*, 120 N. Y. 485.)

The case at bar is another illustration of the embarrassments arising from such a situation and shows that a separate trial of the issues would secure a more satisfactory result. We do not deem it necessary to discuss in detail the various exceptions in this case; it is enough to say we find no reversible error.

Finally, it is insisted there was error in fixing the amount and time of payment of the permanent alimony. The court below reached its determination as to amount on conflicting evidence and in the exercise of a judicial discretion. We are of opinion that there was evidence to sustain the judgment of the court below, and there is nothing to show that the discretion was abused and arbitrarily exercised. It was within

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the discretion of the court to provide that alimony should be paid from the time this action was begun. (*Burr v. Burr*, 10 Paige, 20; *Forrest v. Forrest*, 25 N. Y. 518.)

The judgment should be affirmed, with costs.

All concur, except ANDREWS, Ch. J., not sitting.

Judgment affirmed.

MICHAEL H. HAFFEY, Appellant, v. SARAH LYNCH, Respondent.

It seems the old rule in equity, that where in an action to compel specific performance of a contract to convey real estate, it appears that the defendant is unable to perform in consequence of a defect in his title, which arose after the making of the contract, without fault on his part, and the plaintiff knew of the defect when he commenced his action, the court will not retain the action for the purpose of awarding damages, has been so modified by the practice under the Code, which authorizes the joinder of legal and equitable causes of action, that in such case the action will be retained, and the issue as to breach and damages sent to a jury for trial.

Neither the old rule nor the ground upon which it was based had any application to a case where the defect has disappeared at the time of trial, and in such case, both under the old rule and the present practice, where it appears that there was a defect at the time of the commencement of the action, but the same has ceased to exist, and the vendor's title is valid and perfect at the time of trial, plaintiff is entitled to a judgment for specific performance.

In an action to compel performance of a contract to convey land "by the usual deed containing full covenants with warranty" these facts appeared: At the date of the contract defendant had such a title as she contracted to give. Thereafter an action of ejectment was brought against her by a third person, who claimed the land in fee, in which action a *lis pendens* was filed. In consequence of this defendant refused to make a conveyance. Plaintiff knew of this claim and of the *lis pendens* when he commenced the action. Before the trial, however, the ejectment suit was tried, the complaint dismissed, and the judgment affirmed by the General Term. No appeal was taken to this court and the time to appeal had expired. Plaintiff at the trial herein expressed his consent to accept a deed in terms as prescribed in the contract, and it did not appear that defendant had made any effort to remove the incumbrance of the *lis pendens*. *Held*, that plaintiff was entitled to the relief sought; that it was defendant's duty to make all reasonable efforts to remove any obstacle that stood in the way of performance.

Equity courts, as a general rule, look at the conditions existing at the time of the close of a trial therein and adapt their relief to those conditions, and the plaintiff will not be turned out of court because of any defense interposed, if at the time of trial the facts are such that, if he then commenced the action, he would be entitled to the equitable relief sought.

Haffey v. Lynch (68 Hun, 507), reversed.

(Argued June 15, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made at the April term, 1893, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This was an action to compel the specific performance by defendant of an agreement to sell certain real estate.

The facts, so far as material, are stated in the opinion.

Charles Strauss for appellant. The plaintiff has fully performed his contract and is entitled to specific performance. (Greenl. on Ev. § 113.) It is the general rule that where the vendee in such a contract has performed his part of it up to a given point, he cannot be put in default for non-performance further without a tender to him of a proper deed according to the terms of the contract, and a demand for what more is to be done by him. (*Lawrence v. Miller*, 86 N. Y. 137; *Leaird v. Smith*, 44 id. 618; *Carman v. Pultz*, 21 id. 547.) As the contract called for a deed containing full covenants with warranty, plaintiff had every right to get a deed that would give him a title which shall put him in all reasonable security, and which shall protect him from anxiety and from the annoyance of suits, and from possibly having the land taken from him or his representatives. (*Bigler v. Morgan*, 77 N. Y. 313; 3 Pars. on Cont. 378; *Vought v. Williams*, 120 N. Y. 257; *Moore v. Williams*, 115 id. 586; *Ferry v. Sampson*, 112 id. 415; *Fleming v. Burnham*, 100 id. 1; *Hellreigel v. Manning*, 97 id. 56; *Clarke v. Crandall*, 27 Barb. 73; *North v. Pepper*, 21 Wend. 636; *Cornwell v. Haight*, 21 N. Y. 462; *Skinner v. Tinker*, 34 Barb. 333.) The defendant being now

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in a position to fulfill her contract should be compelled to do so. (*Leaird v. Smith*, 44 N. Y. 619; *Worrall v. Munn*, 38 id. 137; *Cleveland v. Burrill*, 25 Barb. 532; *Bostwick v. Beach*, 103 N. Y. 414; *Taylor v. Taylor*, 43 id. 578, 584; *Mason v. Chambers*, 3 Monroe, 323; *Sibert v. Kelley*, 6 id. 674; *Pumpelly v. Phelps*, 40 N. Y. 66; 3 Washb. on Real Prop. 471-474.) The refusal of the defendant to convey is now based upon mere pretext. (*Pumpelly v. Phelps*, 40 N. Y. 66; *Willard v. Taylor*, 8 Wall. 565; *Losee v. Morey*, 57 Barb. 561, 564-566; 2 Story's Eq. Juris. 746, 748, 751; 3 Pom. Eq. Juris, § 1402; Fry on Spec. Perf. §§ 23, 25; *Rowen v. Presbyterian Congregation*, 6 Bosw. 245, 268; *Seymour v. Delancey*, 3 Cow. 445, 521; *Viele v. T. & B. R. R. Co.*, 20 N. Y. 184; *Stone v. Lord*, 80 id. 60; *Crary v. Smith*, 2 id. 60; *Brown v. Haff*, 5 Paige, 235; *Baumann v. Pinckney*, 118 N. Y. 604.) The deed tendered by the defendant does not affect the plaintiff's right to a new deed in any view of what occurred between the parties on the occasion of such tender. (*Fonda v. Sage*, 48 N. Y. 181-183.)

Henry H. Anderson for respondent. Where the situation of the parties has changed, and one of them can be put in his original situation without fulfillment of the contract, while performance of the contract would be a hardship to the other, the court will not decree specific performance. (*Sternberger v. McGovern*, 56 N. Y. 12; *Haffey v. Lynch*, 68 Hun, 507; *Clarke v. R. L. & N. F. R. R. Co.*, 18 Barb. 350; *Trustees, etc., v. Thatcher*, 87 N. Y. 311-317; *Murdtfelt v. N. Y., W. S. & B. R. R. Co.*, 102 id. 703; *Day v. Hunt*, 112 id. 191-195; *M. E. Co. v. Ward*, 24 Abb. [N. C.] 393; *M. E. Co. v. Ewing*, Id. 419.) The defendant, if liable at all, is liable for damages only. (*Cockcroft v. N. Y. & H. R. R. Co.*, 69 N. Y. 201; *Walton v. Meeks*, 120 id. 79, 82; *Whitman v. Bruce*, 118 id. 321, 419; *Northbridge v. Moore*, id. 419, 422.)

EARL, J. At an auction sale of the defendant's real estate the plaintiff purchased a parcel of land described in the com-

plaint at the price of \$7,800, and paid ten per cent of the purchase price besides certain fees and expenses. The parties signed a written contract specifying the terms of sale and the time and place of full performance by the parties. By the written contract the defendant was to convey the land "by the usual deed containing full covenants with warranty." The defendant did not tender to the plaintiff such a deed as he claimed he was entitled to, and then he commenced this action against her to compel the specific performance of the contract. Upon the trial of the action it appeared that she had at the time of the sale such a title to the land as she was bound to give. But subsequently one Nathaniel Jarvis, Jr., claiming the land in fee, brought an action of ejectment against her to recover the land and filed a *lis pendens*. The plaintiff knew of this claim and the *lis pendens* when he commenced this action, and solely on account of the existence of the *lis pendens*, and such knowledge thereof the court refused specific performance and dismissed the complaint. We think the learned court fell into error, and that upon the undisputed facts found it should have given to the plaintiff judgment for specific performance.

We must first notice the issue joined by the pleadings. The plaintiff alleged in his complaint the contract; that he had performed the same and was ready and willing to perform the same upon receiving such a conveyance as he was entitled to; that after several postponements of time for the performance of the contract at the request of the defendant, her attorney tendered to him a deed of the land, at the same time saying to him that she could not give him a valid and marketable title to the land because it was incumbered; that he rejected the deed on the ground of the alleged incumbrance upon the land, at the same time notifying her that he was ready and willing to perform on his part if she would give him such a deed as he was entitled to; that she refused to give him such a deed; that the title to the land was incumbered and rendered unmarketable by the *lis pendens* filed in the ejectment action; that the defendant could at all times have

obtained the cancellation and discharge of the *lis pendens* and could have conveyed to him such a title as the contract entitled him to. She, in her answer, admitted the making of the contract, denied that he had performed or was ready and willing to perform the contract on his part, admitted the commencement of the ejectment suit and the filing of the *lis pendens*; alleged that she had tendered to him such a deed as she was bound to give; denied that she was at any time unable or unwilling to convey the land, and alleged that she could at all times since the execution of the contract have conveyed the title of the land to him according to the contract had she been so disposed, and that she has at all times been ready and willing so to do.

It thus appears that the issue between the parties was as to the performance of the contract, the plaintiff alleging that he had performed and was ready and willing to perform, and the defendant alleging that she had performed and was ready, willing and able to perform on her part.

On the trial the plaintiff was the sole witness sworn, and the trial judge after finding the ownership of the land by the defendant, and the making of the contract, found as follows: "That the plaintiff has in all things performed all the terms and conditions of said contract, and has been, on his part, ready and willing to fulfill the same, and accept a conveyance of the fee of the said property." "That the said defendant, through her attorneys, has, prior to the commencement of this action, refused to make said conveyance under the said agreement, notwithstanding the plaintiff's frequent requests therefor." "That such refusal on the part of the defendant to make such conveyance, was due to the fact that one Nathaniel Jarvis, Jr., had, after said sale, but before the day fixed for the delivery of the deed thereunder, commenced an action in ejectment in this court against said defendant, claiming the ownership of the premises in question, and had filed a notice of the pendency of said action in the office of the clerk of the city and county of New York, on March 6th, 1889."

"That thereafter, and before the trial of this action, the

said ejectment suit was brought to trial, and the complaint therein was dismissed, and from the judgment entered on such dismissal an appeal was taken to the General Term of this court, which court affirmed said judgment; and no appeal from said order of the General Term has been taken to the Court of Appeals, and the time to do so has now expired."

"That the said plaintiff has expressed his consent at the trial of this action to accept from the defendant a conveyance of said land by the usual deed containing full covenants with warranty, subject to the reservations contained in the 8th paragraph of the said terms of sale."

"That less than three years have passed since the rendering of judgment and the filing of the judgment roll in the said decision of *Jarvis v. Lynch*."

And he found, as conclusions of law, "that the sale having been made in good faith, and the question as to the title of the said premises having arisen since the sale, the defendant should not be compelled to give a warranty deed or procure a policy of title insurance of the Lawyers' Title Insurance Company, insuring the title to the said premises to the plaintiff." "That the defendant is entitled to judgment dismissing the complaint upon the merits of the action." "That such judgment should be without prejudice to the right of the plaintiff to bring an action for damages for breach of the contract set forth in complaint."

The plaintiff has been defeated in his action thus far on the ground that it was impossible for the defendant to perform her contract at the time of the commencement of the action, and that he knew it was. She did not set up such a defense in her answer, but, on the contrary, alleged that she was able and ready to perform her contract; and there was no proof showing that it was then impossible for her to perform the contract. There was no evidence showing what basis, if any, the claim of title to the land by Jarvis had. It may have been colorable and not real or substantial. It did not appear that she had made any effort whatever to remove the incumbrance of the *lis pendens*. It was her duty to perform the

contract and to make all reasonable efforts to remove any obstacle which stood in the way of her performance.

The plaintiff was not in fault for refusing to accept a deed which the defendant at the time declared would convey an incumbered title. He was entitled to a marketable title. (*Moore v. Williams*, 115 N. Y. 586; *Vought v. Williams*, 120 id. 257.)

It is a general rule in equity that the specific performance of a contract to convey real estate will not be granted when the vendor, in consequence of a defect in his title, is unable to perform. In such cases specific performance is denied because the court cannot enforce its judgment and because also it would be oppressive to the vendor. But if the defect in the title existed at the date of the contract, or was due to some fault or to some act of the vendor subsequent to the contract, the court will generally entertain an action for specific performance and retain jurisdiction for the purpose of awarding damages for the breach of the contract. But where, as in this case, the defect in the title arises after the making of the contract, without any fault of the vendor, and the vendee knew of the defect in the title when he commenced his action, it was formerly the rule that the court would not retain the action for the purpose of awarding damages. (*Wiswell v. McGowan*, Hoffman's Ch. 125; *Mooss v. Elmendorf*, 11 Paige, 277.) This rule was adopted because the vendee should not commence a fruitless action in equity simply to recover there his damages for a breach of contract. The rule has been modified since the Code practice which authorizes the joinder of legal and equitable causes of action, and while the equitable relief will be denied in such a case, now the action will be retained and the issue as to the breach of contract and damages will be sent to a jury for trial. (*Sternberger v. McGovern*, 56 N. Y. 12.)

But this rule was adopted in equity not solely because at the time of the commencement of the action the defects in the title existed to the knowledge of the vendee, but also because the case was such that at the time of the rendition of the judgment the court could not grant the equitable relief.

The rule and the ground upon which it is based have no application to a case where the defect has disappeared at the time of the trial and the court can then give an effective judgment for the equitable relief demanded; and no case can be found prior to this where an equity court has denied specific performance, because the vendor's title was defective at the commencement of the action, but valid and perfect at the time of the trial. In such a case why should not the vendor perform? He is able to, and the vendee is entitled to performance unless some other defense has intervened, and the court is able to enforce performance. Here the plaintiff was willing to take such a title as the defendant could convey at the trial. The ejectment suit had finally resulted in favor of the defendant. The *lis pendens* had ceased to be operative, and could, if necessary, have been removed. The fact that Jarvis could have paid the costs and taken a new trial under the statute is of no importance. There was final judgment against him, and the contingency that he might take a new trial is of no more importance than the contingency that some other person might at some time commence an action to recover the same land. Equity courts, in awarding relief, generally look at the conditions existing at the close of the trial of the action and adapt their relief to those conditions. The plaintiff, in an equity action, as a general rule, should not be turned out of court on account of any defense interposed to his action, if at the time of the trial the facts are such, that, if he then commenced his action, he would be entitled to the equitable relief sought.

If a vendor has no title or a defective title to land which he contracts to sell, and subsequently obtains a perfect title, he can be compelled by his vendee to perform his contract. (Fry on Specific Performance [3d ed.], 480.) And why should the vendor not be compelled to perform if he perfects his title while the action for specific performance is pending? A perfect title by the vendor is no part of the vendee's cause of action, and he is just as much entitled to the equitable relief, and the equity court is just as competent to give it, whether

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the title of the vendor was perfected before or after the commencement of the action.

It does not appear that any thing occurred after the commencement of the action which should bar the relief asked by the plaintiff. There are no complications growing out of the lapse of time, and no material change in the situation of the parties or of the land in controversy.

We, therefore, see no reason to doubt, upon the facts found, that the plaintiff was entitled to specific performance of the contract; and the judgment should be reversed and a new trial granted, costs to abide event.

FINCH, O'BRIEN and BARTLETT, JJ., concur; PECKHAM and GRAY, JJ., dissent; ANDREWS, Ch. J., not sitting.

Judgment reversed.

In the Matter of the Application of the EAST RIVER BRIDGE
COMPANY for the Appointment of Three Commissioners.

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| 144 | 650 |

Under the provisions of the act providing for rapid transit railways in certain cities (Chap. 4, Laws of 1891, as amended by chap. 102, Laws of 1892), which makes the authorization of the Supreme Court a prerequisite to the right of a bridge company to construct and operate an elevated railway as an approach to its bridge, in case of failure to obtain the consent of property owners, the power conferred upon the court is discretionary and exclusive, and its order refusing the authorization upon the merits, where no abuse of its discretion is shown, is not reviewable here.

Reported below, 75 Hun, 119.

(Argued June 18, 1894; decided October 9, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 8, 1894, which refused to confirm the report of commissioners appointed in the matter above entitled, and dismissed the proceeding.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

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Edward Lauterbach for appellant. The order of the General Term is reviewable in this court. (Code Civ. Pro. §§ 1337, 3343; Laws of 1891, chap. 4, § 4; *In re A. A. E. R. R. Co.*, 136 N. Y. 292; *Bossout v. R., W. & O. R. R. Co.*, 131 id. 37; *Bryce v. L. Ins. Co.*, 55 id. 240; *Kennedy v. Porter*, 109 id. 526.)

Fordham Morris for respondents *Morris* and *Bailey*. The order is not appealable under the Constitution of this state. (Laws of 1892, chap. 102.) Unless there have been errors of law or practice committed in the conduct of the proceeding, or some substantial right denied, the order is not appealable under the Code. (Code Civ. Pro. §§ 190, 1324, 1337; *In re T. F. S. R. Co.*, 102 N. Y. 343; *In re R. E. R. R. Co.*, 123 id. 358; *In re P. R. R. Co.*, 112 id. 578; *In re K. C. E. R. Co.*, 82 id. 95; *In re Union E. R. R. Co.*, 112 id. 61; *In re N. C. Co.*, 36 Hun, 272; *In re N. Y. C. R. R. Co.*, 70 N. Y. 357.)

Theodore De Witt for *Langdons*, respondents. The General Term of the Supreme Court had power to review the report of the commissioners in every particular and in its discretion to reverse the determination of the commissioners and refuse confirmation of their report. (*In re K. C. E. R. R. Co.*, 82 N. Y. 95; *In re U. R. R. Co.*, 112 id. 61.) The jurisdiction of the General Term of the Supreme Court in these cases is exclusive, and its determination in the case at bar is final and conclusive on all questions affecting the merits and cannot be reviewed on this appeal. (*N. Y. C. Co. v. Mayor, etc.*, 104 N. Y. 1; *In re N. Y. E. R. R. Co.*, 70 id. 327, 359; *In re L. S. & M. S. R. R. Co.*, 89 id. 442; *In re N. Y., L. E. & W. R. R. Co.*, 99 id. 358.) By the express terms of the statute governing the case the petitioner is required to obtain the authorization of the Supreme Court. (Laws of 1892, chap. 102.) The General Term having rejected and refused to confirm the commissioners' report on the merits of the petitioner's application, the rights of the petitioner have been

exhausted so far at least as this proceeding is concerned. (*In re N. Y. E. R. R. Co.*, 70 N. Y. 359; *In re K. C. E. R. R. Co.*, 82 id. 9.)

Clarence C. Ferris for Schoen and others, respondents. This appeal should be summarily dismissed, as it is not an appeal from an order entitled to be heard as a motion. (Code Civ. Pro. § 190, subds. 2, 4, § 192.) This appeal should be dismissed without an examination by this court of all the intricate sets and correlations of facts which appear in the proceedings, because it was intrusted to the particular and local knowledge and to the discretion of the justices of the General Term, held in the city of New York, to make the order from which the petitioner has now appealed. (*In re E. R. B., etc., Co.*, 26 Hun, 490; 92 N. Y. 644; *Walsh v. Schulz*, 6 Civ. Pro. Rep. 126; *Bossout v. R., W. & O. R. R. Co.*, 131 N. Y. 37, 41; *In re M. E. R. R. Co.*, 128 id. 600; *In re P. P. & C. I. R. R. Co.*, 85 id. 489.)

GRAY, J. The East River Bridge Company appeals from an order of the General Term; which refused to confirm the report of commissioners, theretofore appointed to determine whether certain elevated railways should be constructed in the city of New York, in lieu of other approaches to the proposed bridge, or bridges, over the East river. Notwithstanding the ingenious suggestions of the appellant's counsel, there can be no doubt as to our lack of authority to review the order. It is silent as to its grounds and is the simple refusal by the tribunal, to whom the legislature refers the whole matter, to authorize the proceeding.

Its authorization was made a prerequisite to the right of the bridge company to construct and operate an elevated railway, as an approach to its proposed bridge; in the event, which has happened, of the failure to obtain the consents of the property owners. (See chap. 102, Laws 1892, amending chap. 4, Laws 1891.)

By the terms of the statute, the board of directors of any

company, incorporated for the purpose of constructing a bridge connecting one city with another, was authorized to determine to build, in lieu of an approach to the bridge, an elevated railway; the route of which should be co-incidental with such approach.

But, if they so determine, they are required, after obtaining the consent of the local authorities, to obtain the consents of the owners of one-half in value of the property along the proposed route; or, in lieu thereof, the authorization of the Supreme Court upon the report of commissioners. Such a provision, being intended as a safeguard to public and private interests, assumes that where the local authorities and at least one-half in value of the property owners are in accord, with respect to the corporate project, the general interests to be affected will not be prejudiced; and, where they are not in accord, that the propriety and the policy of authorizing its execution can be safely intrusted to the local tribunal; whose judgment will be rendered upon all the facts, as collected and reported upon by its commissioners, and whose determination thus reached should be accepted as conclusive upon the application. The effect of the provision, of course, is to invest the Supreme Court, in the district of the proposed construction, with a discretion in the matter, to be exercised only upon the report which is made to it by its commissioners—a procedure having for its object the collection of evidence and the hearing of all interested parties. The power thus conferred upon that court to give its authorization was, necessarily, exclusive in its nature. When its discretion is exercised, as here, by refusing that authorization, the petitioner is without further remedy in any appeal to this court.

We must assume, (which is the fact, as the opinion discloses), that the majority of the General Term justices, in deciding as they did, deemed the project, upon its merits, an improper, or an unwise and impolitic one to lend their sanction to. Nor can we say, after looking through the record, that any ground exists for arguing that there has been any abuse of discretion in refusing to confirm the commissioners'

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report. As it presented the matter to the court, with all the evidence adduced for and against the application, the questions for determination were such as affected the public and private interests and were to be disposed of upon their merits. It must be admitted that there were reasons for reaching the conclusion stated in the order of the General Term.

With the refusal of the Supreme Court to confirm the report of the commissioners and its dismissal of the proceedings, the matter ended. The case of the *Kings County Elevated Railway Company* (82 N. Y. 95) is quite decisive of the question of appealability. The General Term, in ordering as they did, exercised the judicial discretion, with which the statute invested them, and their order is not reviewable here.

The appeal should be dismissed, with costs.

All concur, except ANDREWS, Ch. J., not sitting.

Appeal dismissed.

In the Matter of the Application of the SOUTHERN BOULEVARD RAILROAD COMPANY to Acquire the Right to Construct a Railroad, etc.

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| 146 | 355 |
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Commissioners appointed under the General Railroad Act (Chap. 140, Laws of 1850, as amended) in proceedings to condemn lands for railroad purposes, are judges of the law and the fact so far as relates to the compensation to be awarded to landowners. When their order has been confirmed and the order of confirmation has been affirmed by the General Term of the Supreme Court, no further appeal can be taken.

The General Term may set aside and vacate the report for errors of law or of fact, and direct a new appraisal. In which case the second report "is final and conclusive on all the parties interested" (§ 18), except in case there is some irregularity in the proceedings affecting the jurisdiction of the commissioners, or fraud, mistake or accident of such a character as would authorize a court of equity to set aside a judgment, a report of a referee or an award of arbitrators.

It seems, where a case is brought within these exceptions, the Supreme Court may, upon motion, set aside the report of the commissioners, and if it refuses so to do, upon undisputed facts, an appeal from its determination may be taken to this court.

An order confirming the report of commissioners in such a proceeding was reversed by the General Term, the report set aside and a new appraisal

ordered. The second report was confirmed and the order of confirmation was affirmed by the General Term. An appeal to this court was dismissed. (141 N. Y. 532.) Thereupon the railroad company made a motion at Special Term to set aside and vacate the second report on the ground that the award made "was vitiated by error, misconduct, irregularity and mistake on the part of the commissioners." There was no claim of irregularity in the proceedings and no allegation of fraud, mistake or accident; the moving party simply alleged errors of law and fact in the determination made. The motion was denied and the order, on appeal to the General Term, was affirmed. *Held*, that the General Term order was not appealable here; that the second report, even if demonstrably erroneous, was final and conclusive.

(Argued June 18, 1894; decided October 9, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 8, 1894, which affirmed an order of Special Term denying a motion to vacate an award made by commissioners.

This proceeding was instituted by the Southern Boulevard Railroad Company under the General Railroad Act of 1850 (Chap. 140), as amended, to acquire the right to construct, maintain and operate a double-track street surface railroad upon land which formerly belonged to Paul Spofford, deceased.

The facts, so far as material, are stated in the opinion.

William H. Page, Jr., for appellant. Appellant's practice in this proceeding has been expressly authorized by this court. (141 N. Y. 532; Laws of 1887, chap. 723.) The commissioners proceeded upon a fundamentally erroneous view of the law in basing their award on a repealed statute. (Laws of 1867, chap. 290; Laws of 1887, chap. 723; Laws of 1884, chap. 252.) The partial repeal by amendment of section 24 of the act of 1867 by chapter 723 of the act of 1887 is a constitutional and valid exercise of legislative power. (*People ex rel. v. Newton*, 112 N. Y. 396; *Louisiana v. Mayor, etc.*, 109 U. S. 285; *Chase v. Curtis*, 113 id. 452; Sedg. on Stat. Const. [2d ed.] 594; *Dartmouth College v. Woodward*, 4 Wheat. 517; *Fletcher v. Peck*, 6 Cranch, 87; *F. Bank v. Hale*, 59 N. Y. 53, 59; *Voorhees v. U. S. Bank*, 10 Pet. 449, 471; *Freeland v.*

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Williams, 131 U. S. 405; *Scofield v. R. Co.*, 43 Ohio St. 571.) The contract which the General Term evolved from the act of 1867 is one which the legislature had no power to make. (N. Y. Const. art. 1, § 7.) The legislature has no power to abridge or impair its right of eminent domain. (Cooley's Const. Lim. 356, 357, 386; *Kohl v. United States*, 91 U. S. 367, 371; *Searl v. School District*, 133 id. 553; *People v. Kerr*, 27 N. Y. 211; Cooley's Const. Lim. [6th ed.] 337.) If it be held that the provisions of the statute of 1867 are, in any sense, a contract which the legislature had power to make, the contract is limited and conditional, dependent upon a contingency which has never arisen, and which, by reason of the amendment to the Constitution in 1875, can never arise. (*Tucker v. Ferguson*, 22 Wall. 527; *H. B. M. & F. R. Co. v. S. B. R. R. Co.*, 41 Hun, 553.) The order and the award sought thereby to be enforced are absolutely void to the extent of six-sevenths of their amounts. (*In re Comrs., etc.*, 96 N. Y. 351; *In re N. Y. & H. R. R. Co. v. Kip*, 46 id. 546; *Strong v. City of Brooklyn*, 68 id. 1; *Embury v. Connor*, 3 id. 511.) The improper rejection of evidence at the hearings vitiates the award and orders appealed from. (*Newman v. M. E. R. Co.*, 118 N. Y. 618; *Somers v. M. E. R. Co.*, 129 id. 576; *Odell v. N. Y. E. R. Co.*, 130 id. 690; *In re Mayor, etc.*, 99 id. 569; *In re N. Y., W. S. & B. R. R. Co.*, 37 Hun, 317.)

Wm. Pierrepont Williams for respondent. If the commissioners had erred in the respects claimed their errors would not be of a character to warrant the setting aside of their report. (*In re N. Y. E. R. R. Co.*, 41 Hun, 502; *In re N. Y. C. & H. R. R. R. Co.*, 64 N. Y. 63; 49 id. 153; *In re P. P. & C. I. R. R. Co.*, 85 id. 489.) In fact the commissioners committed no errors to the prejudice of appellant. (*Stevens v. Marshall*, 3 Chand. 229; *Story v. E. R. R. Co.*, 90 N. Y. 160; *Lahr v. M. E. R. R. Co.*, 104 id. 289; *People v. Suprs.*, 4 Barb. 64, 80; *In re R. & C. R. R. Co.*, 67 N. Y. 242; *In re Washington Park*, 56 id. 144; *People*

ex rel. v. Common Council, 78 id. 56; *Garrison v. City of New York*, 21 Wall. 196; *In re Amsterdam*, 96 N. Y. 351; *Henderson v. N. Y. C. & H. R. R. Co.*; 78 id. 423; *Page v. C. R. R. Co.*, 70 Ill. 324.)

EARL, J. The Southern boulevard was laid out in the towns of Morrisania and West Farms, Westchester county, under the act, chapter 290 of the Laws of 1867. It passed through the land of Paul Spofford, and his land was taken for its construction, and a substantial award was made therefor under that act, the 24th section of which was as follows: "Said road when constructed shall be kept and maintained for the public use as an avenue and boulevard; and except for the purposes of crossing the same, no railway or tramway shall be laid or constructed thereon, or upon any part thereof by any persons or corporations whatsoever, without a special act of the legislature of the state for that purpose first had and obtained; and in case the legislature of the state shall at any future time grant to any person or corporation the right to construct any rail or tramway upon said road or any part thereof, nothing in this act contained shall be construed to affect or cut off the rights of the several owners of land which shall be taken for laying out the road hereby authorized, to claim and recover from such person or corporation the full value of all the land taken from such owner or owners for the road hereby authorized to be constructed, to the same extent as if no such road had ever been laid out on said lands, and without any deduction for any supposed benefit to said lands to arise from the construction of such rail or tramway."

By the act, chapter 723 of the Laws of 1887, that section was amended so as to read as follows: "Said road when constructed shall be kept and maintained for the public use as an avenue and boulevard, and no railway or tramway shall be laid or constructed thereon except by a railway company which has been or may hereafter be duly organized under and by virtue of and in conformity with the provisions of chapter two hundred and fifty-two of the laws of eighteen

hundred and eighty-four, and which has heretofore complied or shall comply with all the provisions of said chapter in respect of the consent of owners of property and the local authorities."

In January, 1890, the Southern Boulevard Railroad Company, the appellant, having complied with the provisions of the law of 1884, instituted this proceeding under the General Railroad Act of 1850, as amended, to acquire "the right to construct, maintain and operate a double-track street surface railroad upon the surface of the soil through, upon and along that portion of the Southern boulevard which formerly belonged to Paul Spofford, deceased, and which is located at or near the junction of the Hunt's Point road with the said boulevard in the twenty-third ward of the city of New York, and also such switches, sidings and turnouts as may be necessary for the convenient working of said railroad and the exercise and enjoyment of the rights, privileges, franchises and immunities now or hereafter to be accorded and secured to it by law."

Three commissioners were appointed and the matter was brought to a hearing before them, and they made their report awarding to the respondents for the fee of the land in the boulevard six cents. They held that the act of 1887 repealed the special rule for compensation of landowners prescribed by the act of 1867, and awarded merely nominal damages because of the existence in and over the land of the boulevard. Their report having been confirmed at the Special Term, the landowners appealed to the General Term of the Supreme Court, and there the order of confirmation was reversed and the report of the commissioners was set aside and a new appraisal was ordered before the same commissioners. (58 Hun, 497.) The General Term held that the act of 1867, as to the compensation to be awarded to the landowners for the construction of a railroad in and upon the boulevard, as provided in section 24, constituted a contract, and that the act of 1887 was ineffectual to alter or impair that contract, and that the compensation to landowners should be

awarded according to the rule laid down in that section. From the order of the General Term the railroad company appealed to this court, and here the appeal was dismissed on the ground that the order was not appealable. (128 N. Y. 93.) The matter was then for the second time brought to a hearing before the commissioners, and, following the rule of damages laid down by the General Term, they awarded the landowners \$6,000. An order was then made at the Special Term adjusting the difference between the two reports and directing payment of such difference, the sum of \$5,999.94. From that order the railroad company appealed to the General Term, where it was affirmed, and it then appealed to this court, and the appeal was dismissed on the ground that the second report was final and conclusive and not reviewable here. (141 N. Y. 532.) Then the railroad company made a motion at Special Term to set aside and vacate the second report of the commissioners on the ground that the award thereby made "was vitiated by error, misconduct, irregularity and mistake on the part of the commissioners in rendering the same," and the motion was denied. From the order of the Special Term the railroad company appealed to the General Term, and there the order was affirmed, and then it appealed to this court.

The controversy between these parties is whether or not section 24 of the act of 1867 was superseded by the amending act of 1887, so that the special rule of damages provided in that section was abrogated. If the question were properly before us for consideration we should certainly find it interesting, and, as shown in the able briefs submitted to us, not free from difficulty. But we are satisfied that no facts appear in this record which give this court, or any court, jurisdiction to set aside the second report.

Th commissioners to be appointed under the General Railroad Act constitute the constitutional tribunal for the award of compensation to landowners. They are not only to determine the facts relating to the matter submitted to them, but all questions of law as well. They are judges of the law

and the facts so far as they relate to the compensation to be awarded. Their report having been confirmed, either party may appeal to the General Term of the Supreme Court, and if the order of confirmation be there affirmed that ends the matter, and no further appeal can be taken. The General Term may set aside and vacate the report, in the exercise of its discretion, for errors of law or of fact, and direct a new appraisal, and it is provided in section 18 of the act that "the second report shall be final and conclusive on all the parties interested." The object of the statute was to secure a speedy determination, before the tribunal specially provided, of the compensation to be awarded to landowners, and to avoid protracted and expensive litigation. This court has always given literal effect to the words "final and conclusive" and has sought to promote the policy upon which the statute is founded. (*Matter of the Application of the Mayor, etc., of New York*, 49 N. Y. 150; *Matter of the N. Y. C. & H. R. R. R. Co.*, 64 id. 60; *Matter of P. P. & C. I. R. R. Co.*, 85 id. 489; *Matter of N. Y. & H. R. R. Co.*, 98 id. 12; *Matter of N. Y., L. & W. Ry. Co.*, 102 id. 704, and 141 id. 532.)

Nothing is alleged upon this motion which did not appear in the record upon the appeal to this court from the second report of the commissioners. It would be a most singular result if that report could not be assailed by appeal and could yet be attacked collaterally by motion upon the same facts brought before the court upon the appeal. If such a practice could be upheld then the policy upon which the statute is based could be entirely subverted.

As has been intimated in several cases, the provision that the second report shall be final and conclusive, nevertheless, has its limitations. If there be any irregularity in the proceeding affecting the jurisdiction of the commissioners, or if there be any fraud or mistake or accident of such a character as would authorize a court of equity in an equitable action to set aside a judgment or report of a referee or an award of arbitrators, then the Supreme Court could upon motion set

aside the report of the commissioners, and if it refused to do so upon undisputed facts, an appeal from its determination could be taken to this court. But there is no dispute about the regularity of the proceedings. All the forms of law were complied with, and there is no allegation of fraud, mistake or accident. The only claim made is that the commissioners and the court below after careful consideration decided the matter in controversy against the railroad company. It alleges errors of law and of fact in the actual determination deliberately and honestly made without accident and without any mistake except as those tribunals may have fallen into error in their views of the law and the facts, and no one will contend that a court of equity would under such circumstances have jurisdiction by action to set aside a judgment.

It may be that a party to such a proceeding may suffer great injustice from errors of law or fact committed by the commissioners or the Supreme Court, without any means of redress. But he is in the same position as every party is against whom a decision has been rendered by a tribunal from which no appeal can be taken.

The award made was for the whole of the land within the limits of the boulevard, and it is now claimed by the appellant that it did not need so much land, and did not seek to acquire so much. But we think from the language of the petition above quoted, that the railroad company did seek to acquire easements in the boulevard over its entire width, and the order appointing the commissioners, which it caused to be entered, described the portion of the boulevard in which it sought to acquire easements for its road, as follows: "That portion of said Southern boulevard which formerly belonged to Paul Spofford, now deceased, situated at or near the junction of the Hunt's Point road with the said boulevard, in the twenty-third ward of the city of New York, and which is about 300 feet in length, along said boulevard, and in width the whole width of said boulevard, to wit, 100 feet."

But the commissioners had before them the description of what the railroad company sought to acquire in the boulevard,

and the nature and extent of the use they expected to make of it, and it was one of the matters they were to determine whether the value of the whole strip of land within the limits of the boulevard was substantially taken, and whether they should base their award upon the whole of such value. If they erred as to this there is no help for it, for reasons above stated.

Our conclusion, therefore, is, that if the commissioners in making their second report erred just as claimed by the appellant, that report is final and conclusive, like the judgment of any court of final resort, although demonstrably erroneous.

The order should be affirmed, with costs.

All concur, except ANDREWS, Ch. J., not sitting.

Order affirmed.

In the Matter of the Application of the Directors of the
BINGHAMTON GENERAL ELECTRIC COMPANY for a Voluntary
Dissolution and for the Appointment of a Receiver.

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The court has no power, in a proceeding under the Code of Civil Procedure for the voluntary dissolution of a corporation, to restrain creditors of the corporation from disposing of its bonds, held as collateral to loans under lawful contracts, empowering them to sell.

The proceeding is purely statutory and the restraining power of the court is such as is given by the Code of Civil Procedure (§ 2423). The equity power of the court does not extend to the sequestration of the property of a corporation by means of a receiver.

Where, therefore, an order in such a proceeding appointing a temporary receiver, contained a clause restraining creditors of the corporation from foreclosing or selling its bonds pledged as collateral, *held*, that the order was properly modified on motion of a creditor who had prior to the institution of the proceeding received bonds of the corporation as collateral security for money loaned, so as not to restrain or prohibit said creditor from foreclosing or selling said bonds, as authorized by the contract under which the bonds were held.

(Argued June 19, 1894 ; decided October 9, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made May 18, 1894,

which modified and affirmed as modified an order of Special Term which modified an order of said court appointing a receiver of the Binghamton General Electric Company.

The nature of the proceeding, the facts and provisions of the order appealed from, so far as material, are stated in the opinion.

W. J. Welsh for appellant. A proceeding for a voluntary dissolution of a corporation is a purely statutory one, in which the court has no power or authority to act except as such power is conferred by statute. (*In re B. S. & F. Co.*, 34 Hun, 369; *Magee v. G. Academy*, 17 N. Y. S. R. 221; 1 N. Y. Supp. 709; *Matter of the Mart*, 22 Abb. [N. C.] 227; *Chamberlain v. R. S. P. V. Co.*, 7 Hun, 557; *U. S. T. Co. v. N. Y., W. S. & B. R. Co.*, 101 N. Y. 478; *Decker v. Gardner*, 124 id. 334; Code Civ. Pro. § 2419; *Ruggles v. Chapman*, 59 N. Y. 163; *R. L. & M. Works v. Kelly*, 88 id. 234; *In re H. P. S. F. Assn.*, 129 id. 288; *People v. Remington*, 121 id. 328.)

George F. Lyon for respondent. The court had the power to grant the order of March first. (*In re S. S. T. B. Co.*, 136 N. Y. 169; *Wilkinson v. N. R. C. Co.*, 66 How. Pr. 423; *P. F. M. Co. v. N. R. C. Co.*, 33 Hun, 156; *Atty.-Gen. v. G. M. L. Ins. Co.*, 77 N. Y. 272; *Woerishoffer v. N. R. C. Co.*, 99 id. 398, 402, 403; 2 Story's Eq. Juris. § 891; *In re H. P. S. F. Assn.*, 129 N. Y. 288-295; *In re G. M. L. Ins. Co.*, 13 Hun, 115; 74 N. Y. 617; *Walling v. Miller*, 108 id. 173.)

BARTLETT, J. This is a proceeding for the voluntary dissolution of a corporation under title XI, chapter XVII of the Code of Civil Procedure. In the order appointing the temporary receiver, all creditors, corporations and other persons were restrained from foreclosing or selling the bonds of the Binghamton General Electric Company pledged as collateral, and from reducing the same to possession. The Bing-

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hamton Trust Company having, prior to the institution of this proceeding, loaned money to the Binghamton General Electric Company and taken its bonds as collateral security, moved to modify the injunction contained in the order appointing the temporary receiver so as to permit it to dispose of the bonds of the Binghamton General Electric Company held as collateral to loans. The Special Term granted the motion and modified the injunction clause accordingly, inserting in its order this provision, viz.: "It being hereby intended to amend said order to the purpose it shall not restrain or prohibit The Binghamton Trust Company, a creditor of said corporation, from foreclosing or selling the bonds of said corporation pledged to it as collateral and for no other purpose." The petitioners in this proceeding appealed from the order of modification, and the General Term modified the order of the Special Term by striking out that part which modified the restraining clause in the original order appointing the receiver. From this order the Binghamton Trust Company appeals.

We are of opinion that the order of the General Term should be reversed. This proceeding is purely statutory, and the terms of the order appointing the temporary receiver and the scope of its injunction clause are defined by section 2423 of the Code of Civil Procedure. The court is empowered to restrain the creditors of the corporation from bringing any action against it for the recovery of a sum of money, or from taking any further proceedings in an action theretofore commenced.

There is nothing in the statute under which this proceeding was instituted authorizing the court to restrain the creditors of the corporation from disposing of its bonds held as collateral to loans under lawful contracts empowering them to sell.

It has long been the settled law of this state that the jurisdiction of Chancery does not extend to the sequestration of the property of a corporation by means of a receiver. (*Atty.-Genl. v. Utica Ins. Co.*, 2 John. Ch. 371; *Atty.-Genl. v. Bk. of Niagara*, Hopk. 354; *U. S. Trust Co. v. N. Y., W. S. & B. Ry. Co.*, 101 N. Y. 478.)

It follows that the authority of the court in this proceeding must be found in the statute and not in its general equitable powers. It is obvious that every lien upon the property of a corporation resting upon valid agreement or process before the appointment of a receiver, the lienor being lawfully in possession, must be preserved with the right of enforcement, unless courts and legislatures are to override the vested rights of creditors. This general principle has been repeatedly recognized and approved by this court. (*Ruggles v. Chapman*, 59 N. Y. 163; *Rogers Locomotive and Machine Works v. Kelley*, 88 id. 234; *In Matter of H. P. S. F. Asso.*, 129 id. 288; *People v. Remington*, 121 id. 328.)

In an early case in this state, Chief Justice SPENCER, in discussing the rights of a secured creditor as bearing upon those of junior or unsecured creditors, said: "I know of no principle of equity which can take from him any part of his security, until he is completely satisfied." (*Evertson v. Booth*, 19 John. 486.) The learned counsel for the respondents has cited a number of cases in this and other courts which he insists justify the original injunction order restraining creditors holding collateral security, but in this he is mistaken.

It is also urged on behalf of the respondents that the Binghamton Trust Company does not hold as collateral security as many of the bonds of the Binghamton General Electric Company as is claimed in the affidavit of its president. That question is not to be determined in this proceeding. The modified order made by the Special Term only authorizes the sale of such bonds by the Binghamton Trust Company as are pledged to it as collateral.

The order appealed from is reversed, with costs, wherein it modifies the order of the Special Term entered in Broome county clerk's office on the 10th day of April, 1894, by striking out that part of said order which modifies the restraining clause in the order of March 1st, 1894, appointing the temporary receiver herein.

All concur, except ANDREWS, Ch. J., not sitting.

Ordered accordingly.

NORFOLK AND NEW BRUNSWICK HOSIERY COMPANY, Respondent, v. ANNA M. ARNOLD, Appellant.

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The parties entered into a contract by which plaintiff agreed to pay specified royalties in monthly installments for the use of a patented invention. Plaintiff paid the royalties for several years, and then refused to make further payments, on the ground that it was induced to enter into the contract by fraud. Defendant commenced three successive actions to recover installments falling due. Plaintiff answered setting up the alleged fraud, and asking to have the contract declared void because thereof. These actions were consolidated. The consolidated action was tried, resulting in a judgment for defendant. Plaintiff appealed, giving an undertaking securing the judgment. Defendant thereafter commenced another action to recover royalties, setting up the judgment so obtained for the purpose of estopping plaintiff from showing the fraud. To prevent the issuing of an attachment in that action plaintiff gave a bond to secure any judgment obtained. Plaintiff commenced this action, setting forth these facts and that defendant intended to commence successive actions as successive installments fell due, and prayed for an injunction restraining defendant, pending the appeal, from prosecuting the action in the Common Pleas, and from bringing other actions for royalties accruing. An order granting a preliminary injunction was affirmed by the General Term on condition that plaintiff give a bond to pay any judgment recovered in the Common Pleas, and to pay all royalties accruing until a final decision in the consolidated action on appeal to this court in case the judgment was affirmed, or the appeal dismissed, and also stipulates that in such case judgment might forthwith be entered, and that no defense would thereafter be interposed to any action to recover royalties. Defendant is substantially irresponsible. *Held*, that the court had jurisdiction of the action and to grant the injunction, and that the temporary injunction was properly granted upon the terms specified; also that the exercise of its discretion by the court below was not reviewable here.

Eldridge v. Hill (2 Johns. Ch. 281), distinguished.

(Argued June 19, 1894; decided October 9, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made May 31, 1894, which modified, and affirmed as modified, an order of Special Term granting an injunction *pendente lite*.

This action was brought to restrain defendant from prosecuting certain actions.

The plaintiff was under written contract, dated April 10, 1882, to pay the defendant royalties for the use of certain patented inventions at the rate of \$500 monthly and to aggregate not less than \$12,000 per annum. It paid the royalties for several years, and then, claiming to have discovered that it was induced to enter into the contract by fraud, it refused to make further payments. Then the defendant, in the year 1891, commenced in the Supreme Court three successive actions to recover installments of royalties which fell due at different times. The plaintiff alleged in defense of these actions the fraud, and prayed judgment that the contract be declared void on account thereof and canceled. The three actions were consolidated by order of the court, and the consolidated action was tried and resulted in a judgment for Mrs. Arnold for upwards of \$19,000. From that judgment the hosiery company appealed to the General Term. Then Mrs. Arnold commenced another action in the New York Common Pleas to recover royalties amounting to \$23,000, and the same defense was interposed as to the prior actions. In her complaint Mrs. Arnold alleged the recovery in the consolidated action for the purpose of showing that the hosiery company was estopped thereby. It was the intention of Mrs. Arnold also to commence successive actions, as installments of royalties fell due pending the appeal of the hosiery company to the General Term and to this court. The hosiery company gave an undertaking upon its appeal from the judgment securing the judgment and staying execution thereon; and it also, for the purpose of preventing an attachment of its property in the Common Pleas, gave a bond in the penalty of \$30,000 to secure the payment of any judgment which might be recovered in that action. Thereafter it commenced this action, alleging the foregoing and other facts, and prayed for an injunction restraining the defendant, pending its appeals, from prosecuting the action pending in the Common Pleas, and from bringing other actions for accruing royalties. The plaintiff then made a motion for a preliminary injunction during the pendency of this action, restraining the defendant as

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Statement of case.

prayed in the complaint, which was granted. Upon appeal by the defendant to the General Term from the order granting the injunction, the order was affirmed on condition that the plaintiff should give to the defendant a bond for \$50,000, to pay any judgment which should be recovered in the Common Pleas, and also all royalties which should accrue until the final decision of the appeal to this court from the judgment in the consolidated action, and should also stipulate that in case that judgment should be affirmed in this court, or the appeal therefrom should be dismissed, judgment in favor of Mrs. Arnold in the Common Pleas action might forthwith be entered for her, and that no defense should be interposed to any action to be brought by her to recover royalties to fall due. From the order of the General Term the defendant has appealed to this court.

Frank E. Blackwell for appellant. The injunction is not in accordance with the Code. (Code Civ. Pro. § 611.) A court of equity has no jurisdiction in such an action, and the complaint states no cause. (*Eldredge v. Hill*, 2 Johns. Ch. 281; *Magee v. Cutler*, 43 Barb. 287; *Morgan v. Morgan*, 21 Am. Dec. 640; *Mayor, etc., v. Meserole*, 26 Wend. 132; *Wiggin v. Mayor, etc.*, 9 Paige, 16; *Haywood v. Buffalo*, 14 N. Y. 534; *S. Bank v. Supervisors*, 25 id. 314; *Sire v. Kneuper*, 22 Abb. [N. C.] 63; *Wolfe v. Burke*, 56 N. Y. 119.) The court has no power to enjoin the prosecution of the suit already brought nor the prosecution of any other suits thereon. (*Bronson v. Kinzie*, 1 How. Pr. 311; *McCracken v. Hayward*, 2 id. 608; *Green v. Biddle*, 8 Wheat. 1; *Memphis v. United States*, 97 U. S. 293; *United States v. Muscatine*, 8 Wall. 575; *Fullerton v. Bank of U. S.*, 1 Pet. 604; *Van Hoffman v. Quincy*, 4 Wall. 535; *Walker v. Whitehead*, 16 id. 314; *Terry v. Anderson*, 95 U. S. 628.) The consolidated suit as tried amounted to an action in equity on the part of the company to cancel the instrument, and thus put it out of the power of Mrs. Arnold to bring any more actions thereon. Now, had such an action originally

been brought by the company it is settled law that after judgment establishing the agreement the court would have no power to grant an injunction restraining Mrs. Arnold from bringing any suit, or from using the agreement established by the decision of the court in any manner whatever. (*E. R. Co. v. Ramsey*, 45 N. Y. 637; *Spears v. Mathews*, 66 id. 127.) Assuming all the questions discussed in the plaintiff's favor, it would yet have to be shown by it that the relief here applied for could not be obtained in the action in the Court of Common Pleas by motion. (*Schell v. E. R. Co.*, 51 Barb. 371; *Hayward v. Wood*, 39 Hun, 596; *Cowper v. Theall*, 40 id. 540; *Lazarus v. Danziger*, 16 N. Y. Supp. 202; *Weber v. Zimmerman*, 23 Md. 56; *Lamb v. Drew*, 20 Iowa, 15; *Chipman v. Bowman*, 14 Cal. 157.)

Walter D. Edmonds and John Hunter, Jr., for respondent. The appeal should be dismissed because an injunction *pendente lite* is in the discretion of the court of original jurisdiction, subject to review only by the General Term, which is the final appellate jurisdiction. (*Hatch v. W. U. T. Co.*, 93 N. Y. 639, 640; *Vandewater v. Kelsey*, 1 id. 533; *Paul v. Miner*, 47 id. 469; *Calkin v. M. O. Co.*, 65 id. 557; *People v. Schoonmaker*, 50 id. 449; *Brown v. Keeney*, 59 id. 242; *Patton v. N. Y. E. R. R. Co.*, 67 id. 484; *Pfoehl v. Sampson*, 59 id. 174; *Rae v. Mayor, etc.*, 62 id. 631.) The court had jurisdiction and power in its discretion to grant the injunction. (Code Civ. Pro. §§ 611, 817, 818; *Gates v. Preston*, 41 N. Y. 113; *T. A. R. R. Co. v. Mayor, etc.*, 54 id. 159; *Walker v. Heller*, 90 Ind. 198.)

EARL, J The claim of the defendant is that, upon the facts made to appear in this case, the court had no jurisdiction to stay proceedings in the Common Pleas action, and the commencement of further actions to recover royalties under the contract between the parties.

The jurisdiction of a court of equity by action to restrain proceedings in actions pending in courts of law should be sparingly exercised, and only when other remedies are inade-

quate and the equities invoking its jurisdiction are apparent and strong. There is no hard and fast rule about it, and every case must depend largely upon its own circumstances. (Pomeroy's Eq. Jur. § 1371; *Hart v. Mayor of Albany*, 3 Paige Ch. 381; *Erie Railway Co. v. Ramsey*, 45 N. Y. 637; *Third Ave. R. R. Co. v. The Mayor of N. Y.*, 54 id. 159; *Schuehle v. Reiman*, 86 id. 270.)

The purpose of this action is to compel the settlement of the controversy between these parties in the one action, and thus to prevent multiplicity of actions, and that is a purpose usually favored by courts of equity.

A case appealing more strongly than this to an equity court for relief could rarely be found. There appears to be an honest controversy between the parties, the plaintiff and its counsel believing that it has a good defense to the royalties claimed. The amount involved in the controversy is large. One action involving the expenditure of much time and money has been tried, and the defendant has a judgment establishing her right. The plaintiff desires to bring that judgment under review, if necessary, in the court of last resort, and the defendant intended and threatened to proceed in the Common Pleas action, and to commence other actions for successive installments of royalties, and the plaintiff was absolutely barred of any defense to such action by the estoppel of the judgment she had already recovered; and thus inevitably it would be subjected to large expenses and costs. She could enforce payment of her judgments, and being substantially irresponsible it might lose all the money it was obliged to pay and thus subjected to irreparable loss.

The plaintiff was without other adequate relief, and even if it might from the Common Pleas probably obtain a stay of the action there pending, no court of law could stay the commencement of successive actions and thus the piling up of unnecessary costs. Under such circumstances we think it was a wise exercise of its jurisdiction for the court in this action to grant the injunction upon terms adequate for the defendant's protection. She had ample security for the pay-

ment of her royalties to an amount exceeding \$100,000, and a stipulation which will end all litigation in case of the affirmation of her judgment, or the dismissal of the appeal. Thus, all her rights and interests are fully protected, and she should not be permitted to harass and oppress her adversary with unnecessary litigation.

The defendant claims that this injunction, so far as it prevents the commencement of further actions to enforce the payment of her royalties, is illegal, violating her constitutional rights. But she is not deprived of her remedy upon her contract. Her actions are simply stayed with adequate security for her protection, not arbitrarily, but simply until her right to recover royalties is finally determined in an action involving all the questions upon which the rights of the parties depend. This stay is granted, not by the arbitrary *fat* of the legislature, but in a judicial proceeding in which she has had an opportunity to be heard. Such stays granted in regular judicial proceedings to promote the ends of justice violate no constitutional right and are not uncommon in judicial annals.

The case of *Eldredge v. Hill* (2 Johns. Ch. 281) must not be given too wide a scope as authority. There the purpose of the equitable action was to restrain the commencement of successive actions to recover damages for a nuisance. There the plaintiff could have prevented the successive suits by abating the nuisance, and that he could have done without any considerable loss or damage to himself, and hence the resort to the equitable action was unnecessary. Here the plaintiff could do nothing to prevent the multiplication of suits, and, bound hand and foot by the estoppel of the first judgment, it was at the mercy of the defendant, except for such relief as it could get in a court of equity by such an action as this.

Therefore, as the court had jurisdiction to grant the injunction, its discretion is not reviewable here, and the appeal must be dismissed, with costs.

All concur, except ANDREWS, Ch. J., not sitting, and BARTLETT, J., not voting.

Appeal dismissed.

ERNEST ST. GEORGE LOUGH et al., Appellants, v. A. EMILIUS
OUTERBRIDGE et al., Respondents.

A defendant in an equity action cannot avail himself of the defense that an adequate remedy at law exists, unless he pleads that defense in his answer, and where the facts alleged are sufficient to entitle plaintiff to relief in some form of action, and no objection has been made by defendant in his answer or on the trial, it is too late to raise the point after judgment or upon appeal.

A common carrier is liable to an action at law for damages in case of refusal to perform its duties to the public for a reasonable compensation.

While a common carrier is bound to convey and deliver goods for a reasonable compensation, and may not, where the circumstances and conditions are the same, unreasonably or unjustly discriminate in favor of one against another, it may make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases for special reasons and upon special conditions.

A carrier may by special agreement give reduced rates to customers who stipulate to give it all their business, and refuse those rates to others who are not able or willing to so stipulate, provided that the charge exacted from those others is not excessive or unreasonable.

The Q. S. Co., defendant, was engaged in business as a common carrier transporting freight between N. Y. and certain islands, among them B. Its steamers sailed from N. Y. at intervals of about ten days. Another steamer, which was engaged in the South American trade, and sailed from N. Y. at intervals of about six weeks, took freight for B. Said company's regular rates were fifty cents per dry barrel. It and the other defendants, its agents, offered special reduced rates of twenty-five cents per dry barrel to all merchants and business men in N. Y. who would agree to ship by their line exclusively during the week said outside steamer was there engaged in obtaining freight and taking on cargo. Plaintiffs' firm, which were shipping by that steamer, demanded of defendants that they receive certain barrels of freight and transport the same from N. Y. to B. at the special rate of twenty-five cents. This defendants offered to do if said firm would agree to give their shipments for that week exclusively to their line, and also offered to carry plaintiffs' freight at all times without conditions for forty cents. This offer the firm declined, and plaintiffs refused to receive the freight. The same rates, terms and conditions were offered to all shippers. In an action to compel defendants to receive and transport plaintiffs' freight at the special reduced rates, without conditions, the court found that the rate of forty cents was a reasonable one, and that the reduced rate of twenty-five cents was not profitable. *Held*, that the action was

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not maintainable; that plaintiffs were not entitled to any relief either at law or in equity; and so, that the complaint was properly dismissed.

Menacho v. Ward (27 Fed. Rep. 529) distinguished.

Reported below, 68 Hun, 486.

(Argued June 20, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 14, 1893, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiffs against defendants, the Quebec Steamship Company and its agents, to compel them to grant to plaintiffs terms, facilities and accommodation for transportation of freight by said company's line equal to those granted other shippers.

The facts, so far as material, are stated in the opinion.

Treadwell Cleveland for appellants. The defendants as common carriers are bound to treat the plaintiffs and all other shippers upon substantially similar terms for similar service. (*A. T. & S. F. R. R. Co. v. D. & N. O. R. R. Co.*, 110 U. S. 674; *U. P. R. R. Co. v. Goodridge*, 149 id. 690; *McDuffee v. P. & R. R. Co.*, 52 N. H. 430; *C. & A. R. R. Co. v. People*, 67 Ill. 11; *I. D. & S. R. R. Co. v. Ervin*, 118 id. 255; *I. C. R. R. Co. v. People*, 121 id. 318; *Sanford v. R. R. Co.*, 24 Penn. St. 378; *Audenreid v. P. R. R. Co.*, 68 id. 378; *Stewart v. L. V. R. R. Co.*, 38 N. J. L. 505; *Atwater v. D., L. & W. R. R. Co.*, 48 id. 55; *E. Co. v. M. C. R. Co.*, 57 Maine, 188; *Scofield v. L. S. & M. S. R. Co.*, 43 Ohio St. 581; *State v. C., N. O. & T. R. R. Co.*, 47 id. 130; *Root v. L. I. R. R. Co.*, 114 N. Y. 300; *Messenger v. P. R. Co.*, 36 N. J. L. 407; *Diphwys v. F. R. Co.*, 2 N. & M. 73; *Baxendale v. G. N. R. Co.*, 1 id. 200; *Harris v. C. N. R. Co.*, Id. 97; *Vedder v. Fellows*, 20 N. Y. 126; *Avery v. N. Y. C. & H. R. R. Co.*, 121 id. 31, 44; *Lynch v. M. R. R. Co.*, 90 id. 83.) The court had jurisdiction of this action in equity. (Hilliard on Inj. § 31.)

Wilhelmus Mynderse for respondents. The plaintiffs do not present a case entitling them to relief by injunction. (*McDuffee v. P. R. R. Co.*, 52 N. Y. 430; *C. & N. W. R. Co. v. People*, 56 Ill. 365.) A carrier has a right to reduce its usual rates in favor of particular consignors, provided it exacts from no shipper more than a reasonable rate. (*Wood's Railway Law*, 566, 574; *F. R. R. Co. v. Gage*, 12 Gray, 393; *Sargent v. B. & L. R. Co.*, 115 Mass. 422; *E. T. Co. v. P. R. R. Co.*, 24 La. Ann. 1; *M. S. S. Co. v. M. G. & Co.*, L. R. [21 Q. B. Div.] 544; *Evershed v. L. & N. W. R. Co.*, 3 id. 135.) Discrimination in rates, if fair and reasonable, is permitted. The interests of the carrier are bound to be regarded, and advantages may be granted by him to individuals where it is made clear that, in entering into such an agreement, the carriers have in view only their own interests, the legitimate increase of their business, and the consideration given to them in return for the advantages. (*Nicholson v. G. W. R. R. Co.*, 94 E. C. L. R. 366.)

O'BRIEN, J. The question presented by this appeal is one of very great importance. It touches commerce and, more especially, the duties and obligations of common carriers to the public at many points. There was no dispute at the trial and there is none now with respect to the facts upon which it arises. In order to present the question clearly a brief statement of these facts becomes necessary. The plaintiffs are the surviving members of a firm that for many years prior to the transaction upon which the action was based, had been engaged in business as commission merchants in the city of New York, transacting their business mainly with the Windward and Leeward Islands. The defendant, the Quebec Steamship Company, is a Canadian corporation, organized and existing under the laws of Canada, and the other defendants are the agents of the corporation in New York, doing business as partners. The business of the corporation is that of a common carrier, transporting passengers and freight for hire upon the sea and adjacent waters. For nearly twenty years

prior to the transaction in question a part of its business was the transportation of cargoes between New York and the Barbadoes and the Windward Islands, the other defendants acting as agents in respect to this business. During some years prior to the commencement of this action the company had in its service a fleet of five or six of the highest class iron steamers, sailing at intervals of about ten days from New York to the islands, each steamer requiring about six weeks to make the trip. The steamers were kept constantly engaged in this service, and sailed regularly upon schedule days without reference to the amount of cargo then received. The regular and standard rate charged for freight up to December, 1891, from New York to Barbadoes, one of the Windward Islands, was fifty cents per dry barrel of five cubic feet, which was taken as the unit of measurement, and the tariff of charges was adjusted accordingly for goods shipped in other forms and packages. In December, 1891, the regular rate was reduced from fifty to forty cents per dry barrel. About this time the British steamer *El Callao*, which had for some years before sailed between New York to Ciudad Bolivar in South America, transporting passengers and freight between these points, began to take cargo at New York for Barbadoes, and sometimes to other points in the Windward Islands which she passed on her regular trips to Ciudad Bolivar, sailing from New York at intervals of five or six weeks. Her trade with South America was the principal feature of her business, but such space as was not required for the cargo destined for the end of the route was filled with cargo for the islands which lay in her regular course.

The defendants evidently regarded this vessel as a somewhat dangerous competitor for a part of the business, the benefits of which they had up to this time enjoyed, and for the purpose of retaining it they adopted the plan of offering special reduced rates of twenty-five cents per dry barrel to all merchants and business men in New York who would agree to ship by their line exclusively during the week that the *El Callao* was engaged in obtaining freight and taking on cargo.

The plaintiff's firm had business arrangements with and were shipping by that vessel, and in February, 1892, they demanded of the defendants that they receive three thousand barrels of freight from New York to Barbadoes and transport the same at the special rate of twenty-five cents per barrel upon one of its steamers. The defendants then informed the plaintiffs that the rate of twenty-five cents was allowed by them only to such shippers as stipulated to give all their business exclusively to the defendants' line, in preference to the *El Callao*, and that to all other shippers the standard rate of forty cents per dry barrel was maintained. But they further informed the plaintiffs that if they would agree to give their shipments for that week exclusively to the defendants' line the goods would be received at the twenty-five cents rate. The plaintiffs, however, were shipping by the other vessel and declined this offer. Again, in the month of May, 1892, the *El Callao* was in the port of New York taking on cargo, as was also the defendants' steamer *Trinidad*. The plaintiffs then demanded of the defendants that they receive and carry from New York to Barbadoes about seventeen hundred and sixty dry barrels of freight at the rate of twenty-five cents. The defendants notified the plaintiffs that a general offer had that day been made by them to the trade to take cargo for Barbadoes on the *Trinidad*, to sail on June 4, at twenty-five cents per dry barrel, under an agreement that shippers accepting that rate should bind themselves not to ship to that point by steamers of any other line between that date and the sailing of the *Trinidad*. The defendants offered these terms to the plaintiffs, but as they were shipping by the rival vessel the offer was declined. Except during the week when the *El Callao* was engaged in taking on cargo the defendants have maintained the regular rate of forty cents to all shippers between these points, and when it reduced the rate as above described exactly the same rates, terms and conditions were offered to all shippers, including the plaintiffs, and they carried freight for other parties at the reduced rates, only upon their entering into a stipulation not to ship by the rival vessel. After the plaintiffs' demand,

last mentioned, had been refused, they obtained an order from one of the judges of the court in this action requiring the defendants to carry the seventeen hundred and sixty barrels, and the defendants did receive and transport them, in obedience to the order, at the rate of twenty-five cents, but this order was reversed at General Term. The plaintiffs demand equitable relief in the action to the effect, substantially, that the defendants be required and compelled by the judgment of the court to receive and transport for the plaintiffs their freight at the special reduced rates, when allowed to all other shippers, without imposing the condition that the plaintiffs stipulate to ship during the times specified by the defendants' line exclusively.

Whether the regular rate of forty cents, for which it is conceded that the defendants offered to carry for the plaintiffs at all times without conditions, was or was not reasonable, was a question of fact to be determined upon the evidence at the trial, and the learned trial judge has found as matter of fact that it was reasonable, and that the reduced rate of twenty-five cents granted to shippers on special occasions, and upon the conditions and requirements mentioned, was not profitable. This finding, which stands unquestioned upon the record, seems to me to be an element of great importance in the case which must be recognized at every stage of the investigation.

A common carrier is subject to an action at law for damages in case of refusal to perform its duties to the public for a reasonable compensation, or to recover back the money paid when the charge is excessive.

This right to maintain an action at law upon the facts alleged, it is urged by the learned counsel for the defendants, precludes the plaintiffs from maintaining a suit for equitable relief such as is demanded in the complaint. There is authority in other jurisdictions to sustain the practice adopted by the plaintiffs (*Watson v. Sutherland*, 5 Wall. 74; *Menaicho v. Ward*, 27 Fed. R. 529; 54 T. R. 741; 3 id. 775; 49 Ill. 33; 44 O. St. 571), though I am not aware of any in this state that would bring a case based upon such facts within the usual or

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ordinary jurisdiction of equity. [So far as this case is concerned it is sufficient to observe that it is now settled by a very general concurrence of authority, that a defendant cannot, when sued in equity, avail himself of the defense that an adequate remedy at law exists unless he pleads that defense in his answer. (*Cogswell v. N. Y., N. H. & H. R. R. Co.*, 105 N. Y. 319; *Town of Mentz v. Cook*, 108 id. 504; *Ostrander v. Weber*, 114 id. 95; *Dudley v. Congregation St. Francis*, 138 id. 460; *Truscott v. King*, 6 id. 147.)

When the facts alleged are sufficient to entitle the plaintiff to relief in some form of action, and no objection has been made by the defendant to the form of the action in his answer or at the trial, it is too late to raise the point after judgment or upon appeal. So that, whatever objections might have been urged originally against the action in its present form, the defendants must now be deemed to have waived them. This court will not stop to examine a minor question that does not touch the merits but relates wholly to the form in which the plaintiffs have presented the facts and demanded relief, or to the practice and procedure. The time and place to raise and discuss these questions was at or before the trial, and as they were not then raised the case must be examined and disposed of upon the merits.]

The defendants were engaged in a business in which the public were interested, and the duties and obligations growing out of it may be enforced through the courts and the legislative power. (*Munn v. Illinois*, 94 U. S. 113; *People v. Budd*, 117 N. Y. 1.) In England these duties are, to a great extent, regulated by the Railway and Canal Traffic Act (17 & 18 Vict. ch. 31), and by statute in some of the states, and in this country, so far as they enter into the business of interstate commerce, by act of Congress. The solution of the question now presented depends upon the general principles of the common law, as there is no statute in this state that affects the question, and the legislation referred to is important only for the purpose of indicating the extent to which business of this character has been subjected to public regulation for the

general good. There can be no doubt that at common law a common carrier undertook generally, and not as a casual occupation, to convey and deliver goods for a reasonable compensation as a business, with or without a special agreement, and for all people indifferently, and in the absence of a special agreement, he was bound to treat all alike in the sense that he was not permitted to charge any one an excessive price for the services. He has no right in any case while engaged in this public employment to exact from any one anything beyond what under the circumstances is reasonable and just. (2 Kent's Com. [13th ed.] 598; Story on Bailments, §§ 495, 508; 2 Parsons on Cont. 175; *Killmer v. N. Y. C. & H. R. R. Co.*, 100 N. Y. 395; *Root v. L. I. R. R. Co.*, 114 id. 300.) It may also be conceded that the carrier cannot unreasonably or unjustly discriminate in favor of one or against another where the circumstances and conditions are the same. The question in this case is whether the defendants, upon the undisputed facts contained in the record, have discharged these obligations to the plaintiffs. There was no refusal to carry for a reasonable compensation. On the contrary, the defendants offered to transport the goods for the forty cents rate, and we are concluded by the finding as to the reasonable nature of that charge. The defendants even offered to carry them at the unprofitable rate of twenty-five cents, providing the plaintiffs would comply with the same conditions upon which the goods of any other person were carried at that rate. What is reasonable and just in a common carrier in a given case is a complex question into which enters many elements for consideration. The questions of time, place, distance, facilities, quantity and character of the goods, and many other matters must be considered. The carrier can afford to carry 10,000 tons of coal or other property to a given place for less compensation per ton than he could carry fifty, and where the business is of great magnitude a rebate from the standard rate might be just and reasonable while it could not fairly be granted to another who desired to have a trifling amount of goods carried to the same point. So long as the

regular standard rates maintained by the carrier and offered to all are reasonable one shipper cannot complain because his neighbor, by reason of special circumstances and conditions, can make it an object for the carrier to give him reduced rates. In this case the finding implies that the defendants at certain times carried goods at a loss upon the condition that the shippers gave them all of their business. Whatever effect may be given to the legislation referred to, in its application to railroads and other corporations deriving their powers and franchises from the state, there can be no doubt that the carrier could at common law make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases for special reasons and upon special conditions without violating any of the duties or obligations to the public inherent in the employment. If the general rates are reasonable a deviation from the standard by the carrier in favor of particular customers, for special reasons, not applicable to the whole public, does not furnish to parties not similarly situated any just ground for complaint. When the conditions and circumstances are identical the charges to all shippers for the same service must be equal. These principles are well settled, and whatever may be found to the contrary in the cases cited by the learned counsel for the plaintiff originated in the application of statutory regulations in other states and countries. (*Fitchburg R. R. Co. v. Gage*, 12 Gray, 393; *Sargent v. B. & L. R. Corp.*, 115 Mass. 422; *Mogul S. S. Co. v. McGregor, Gow & Co.*, L. R. [21 Q. B. Div.] 544; *affd.*, 23 Q. B. Div. 598, and by II. L. [17 Appeal Cases] 25; *Evershed v. L. & N. W. Ry. Co.*, L. R. [3 Q. B. Div.] 135; *Baxendale v. E. Co. R. Co.*, 4 C. B. [N. S.] 78; *Branley v. S. E. R. Co.*, 12 id. 74.)

Special favors in the form of reduced rates to particular customers may form an element in the inquiry whether, as matter of fact, the standard rates are reasonable or otherwise. If they are extended to such persons at the expense of the general public the fact must be taken into account in ascertaining whether a given tariff of general prices is or is not

reasonable. But as in this case the reasonable nature of the price, for which the defendants offered to carry the plaintiffs' goods, has been settled by the findings of the trial court, it will not be profitable to consider further the propriety or effect of such discrimination. The rule of the common law was thus broadly stated by the Supreme Court of Massachusetts in the case of the *Fitchburg R. Co. v. Gage* (*supra*). Upon that point the court said: "The recent English cases, cited by the counsel for the defendants, are chiefly commentaries upon the special legislation of Parliament regulating the transportation of freight on railroads constructed under the authority of the government there; and consequently throw very little light upon questions concerning the general rights and duties of common carriers, and are for that reason not to be regarded as authoritative expositions of the common law upon these subjects. The principle derived from that source is very simple. It requires equal justice to all. But the equality which is to be observed consists in the restricted right to charge a reasonable compensation and no more. If the carrier confines himself to this no wrong can be done. If, for special reasons in isolated cases, the carrier sees fit to stipulate for the carriage of goods of any class for individuals, for a certain time, or in certain quantities, for a less compensation than what is the usual, necessary and reasonable rate, he may undoubtedly do so without entitling all parties to the same advantage."

In *Evershed v. L. & N. W. Ry. Co.* (*supra*) Lord BRAMWELL remarked: "I am not going to lay down a precise rule, but, speaking generally, and subject to qualification, it is open to a railway company to make a bargain with a person, provided they are willing to make the same bargain with any other, though that other may not be in a situation to make it. An obvious illustration may be found in season tickets." The authorities cited seem to me to remove all doubt as to the right of a carrier, by special agreement, to give reduced rates to customers who stipulate to give them all their business, and to refuse these rates to others who are not able or willing to

so stipulate, providing, always, that the charge exacted from such parties for the service is not excessive or unreasonable. The principle of equality to all, so earnestly contended for by the learned counsel for the plaintiffs, was not, therefore, violated by the defendants, since they were willing and offered to carry the plaintiffs' goods at the reduced rate, upon the same terms and conditions that these rates were granted to others, and if the plaintiffs were unable to get the benefit of such rate it was because, for some reason, they were unable or unwilling to comply with the conditions upon which it was given to their neighbors, and not because the carrier disregarded his duties or obligations to the public. The case of *Menacho v. Ward* (27 Fed. Rep. 529) does not apply, because the facts were radically different. That action was to restrain the carrier from exacting unreasonable charges habitually for services, the charges having been advanced as to the parties complaining, for the reason that they had at times employed another line. It decides nothing contrary to the general views here stated. On the contrary, the court expressly recognized the general rule of the common law with respect to the obligations and duties of the carrier substantially as it is herein expressed, as will be seen from the following paragraph in the opinion of Judge WALLACE:

"Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence, it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than a fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preference in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and, except as thus restricted, he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public."

But it is urged that the plaintiffs were in fact the only shippers of goods from New York to Barbadoes by the *El*

Callao, and, therefore, the condition imposed that the reduced rate should be granted only to such merchants as stipulated to give the defendants their entire business, while in terms imposed upon the public generally, was in fact aimed at the plaintiffs alone. The trial court refused to find this fact, but, assuming that it appeared from the undisputed evidence, I am unable to see how it could affect the result. The significance which the learned counsel for the plaintiffs seems to give to it in his argument is that it conclusively shows the purpose of the defendants to compel the plaintiffs to withdraw their patronage from the other line, to suppress competition in the business, and to retain a monopoly for their own benefit. Conceding that such was the purpose it is not apparent how any obligation that the defendants owed to the public was disregarded. We have seen that the defendants might lawfully give reduced rates in special cases to particular customers and refuse them in others where the conditions are different or to the general public where the regular rates are reasonable. The purpose of an act which in itself is perfectly lawful or, under all the circumstances, reasonable, is seldom, if ever, material. (*Phelps v. Nowlen*, 72 N. Y. 39; *Kiff v. Youmans*, 86 id. 324.) The mere fact that the transportation business between the two points in question was in the hands of the defendants did not necessarily create a monopoly, if the general rates maintained were reasonable and just. It is not pretended that the owners of the *El Callao* proposed to give regular service to the general public for any less. When the service is performed for a reasonable and just hire the public have no interest in the question whether one or many are engaged in it. The monopoly which the law views with disfavor is the manipulation of a business in which the public are interested in such a way as to enable one or a few to control and regulate it in their own interest and to the detriment of the public by exacting unreasonable charges. But when an individual or a corporation has established a business of a special and limited character, such as the defendants in this case had, they have a right to retain it by the use of all lawful means. That was

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what the defendants attempted to do against a competitor that engaged in it, not regularly or permanently, but incidentally and occasionally. The means adopted for this purpose was to offer the service to the public at a loss to themselves whenever the competition was to be met and when it disappeared to resume the standard rates, which, upon the record, did not at any time exceed a reasonable and fair charge. I cannot perceive anything unlawful or against the public good in seeking by such means to retain a business which it does not appear was of sufficient magnitude to furnish employment for both lines. On this branch of the argument the remarks of Lord COLERIDGE in the case of the *Mogul S. S. Co. v. McGregor* (*supra*) are applicable: "The defendants are traders with enormous sums of money embarked in their adventure, and naturally and allowably desire to reap a profit from their trade. They have a right to push their lawful trades by all lawful means. They have a right to endeavor, by lawful means, to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing by profitable offers customers to deal with them rather than with their rivals. It follows that they may, if they see fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted by those who withdraw them on the customers who decline to deal exclusively with them dealing with other traders."

The courts, I admit, should do nothing to lessen or weaken the restraints which the law imposes upon the carrier, or in any degree to impair his obligation to serve all persons indifferently in his calling, in the absence of a reasonable excuse, and for a reasonable compensation only. But to hold, as we are asked to in this case, that the plaintiffs were entitled to have their goods carried by the defendants at an unprofitable rate without compliance with the conditions upon which it was

granted to all others, and which constituted the motive and inducement for the offer, would be extending these obligations beyond the scope of any established precedent based upon the doctrine of the common law, and would, I think, be contrary to reason and justice.

The judgment of the court below dismissing the complaint was right, and should be affirmed, with costs.

FINCH, GRAY and BARTLETT, JJ., concur; PECKHAM, J., dissents.

Judgment affirmed.

UNITED STATES TRUST COMPANY of New York, as Trustee,
etc., Appellant, v. MILES M. O'BRIEN, Respondent.

In an action at law to recover damages for breach of a covenant it is no answer that plaintiff had a remedy in equity to prevent the violation of the covenant and did not avail himself of it.

In an action for a breach of contract the damages recoverable are those which the parties may fairly be supposed when they made the contract to have contemplated as naturally following its violation.

The inquiry is, what is an adequate indemnity to the party injured, and while damages which are "uncertain, speculative and contingent" are not recoverable, plaintiff is not bound to show to a certainty which excludes the possibility of a doubt, that the loss claimed resulted from defendant's violation of the contract. Reasonable certainty, founded upon inferences legitimately and properly deducible from the evidence that the loss resulted from the breach and was the natural and proximate result thereof, is all that is required.

A lease to defendant of a building in the city of New York for a term which expired May 1, 1889, contained covenants on the part of the lessee against subletting or assigning; also, that at reasonable hours in the daytime he would permit the lessor or his agent to show the premises to such persons as they desired for the purpose of selling or leasing, and that he would permit the usual notice of "To let" to be posted on the premises, and to remain there without molestation. In an action to recover damages for breach of this covenant these facts appeared: Defendant sublet the premises to another for a portion of the term, who took possession; he refused to permit the posting of any notice, and refused entrance to any one desirous of looking at the house for the purpose of leasing or purchasing; after expiration of the lease the house remained unoccupied and without being leased or sold until February 1, 1890, when it was leased for \$900 a year. Evidence was given that in May,

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1889, the rental value was \$1,000; also tending to prove that directly in consequence of the violation of the covenants plaintiff suffered some loss of rent. The trial court held that the failure to rent could not, upon the evidence, be regarded as the natural or necessary consequence of the breach, and directed a judgment for nominal damages only. *Held*, error; that the covenants as to posting the notice and showing the premises, were included in the lease to aid the lessor in re-leasing at the expiration of the term with the least possible delay, and in inserting them the parties contemplated an amount of rent which might be lost by an inexcusable refusal to perform them, as a proper measure of damages; and that the evidence was sufficient to require the submission of the question to the jury as to whether there was a loss of rent because of the violation of the covenants.

(Argued June 21, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 5, 1893, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edward W. Sheldon for appellant. The failure to rent the premises from May 1, 1889, to February 1, 1890, was the direct, natural and certain consequence of the defendant's breach of the covenants in the lease. (*R. L. Co. v. S. & P. P. Co.*, 135 N. Y. 209; *Davis v. Garnett*, 6 Bing. 716; *Drucker v. M. R. Co.*, 106 N. Y. 157; *Wakeman v. W. & W. Co.*, 101 id. 205; *Beeman v. Banta*, 118 id. 538; *Wait v. Borne*, 123 id. 592, 607; *Bernstein v. Meech*, 130 id. 344, 360; *Rumsey v. N. Y. & N. E. R. R. Co.*, 136 id. 543, 546; *Friedland v. Myers*, 139 id. 432, 436.) The burden of proof was on the defendant to show that the plaintiff, by negligence or inaction, contributed to or enhanced the loss. (*Colrick v. Swinburne*, 105 N. Y. 503, 508; *Swain v. Schieffelin*, 134 id. 471, 474; *Baker v. Drake*, 53 id. 211.) The opinion of the General Term on the first appeal of this case was erroneous. (*Baker v. Drake*, 53 N. Y. 211; *Swain v. Schieffelin*, 134 id. 471; *Roosevelt v. Hopkins*, 33 id. 81; *Williams v. Earle*,

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L. R. [3 Q. B.] 769; *Ganson v. Tift*, 71 N. Y. 48; *Townsend v. Scholey*, 42 id. 18; Fox on Landl. & Ten. 208.) If any preventive remedy in equity existed, it was not exclusive of a suit for damages. (*Beach v. Crain*, 2 N. Y. 86; *Lockrow v. Horgan*, 58 id. 635.)

Peter A. Hendrick for respondent. It cannot be said that the proximate cause of the house remaining idle from the 1st of May, 1889, until the 1st of February, 1890, arose from the defendant's refusing to allow the notice "To let" to be placed upon the house or persons to inspect the same, or that the fact that the house remained empty was the natural result of such acts, and, therefore, no damage was shown. (1 Sedg. on Dam. [8th ed.] 56; 2 Greenl. on Ev. [14th ed.] § 256; *Griffin v. Colver*, 16 N. Y. 489; *Baldwin v. U. S. T. Co.*, 45 id. 744; *Parsons v. Saltus*, 66 id. 92; *Frye v. Maine Central*, 67 Maine, 414; *U. S. T. Co. v. Gildersleeve*, 96 Am. Dec. 519; *Ashe v. DeRosset*, 72 id. 552; *Allen v. McConike*, 124 N. Y. 342; *Friedland v. Myers*, 139 id. 432.)

PECKHAM, J. The plaintiff commenced this action to recover damages for the breach of certain covenants contained in a lease of premises situated in the city of New York to the defendant for a dwelling house. After the evidence was all in the court directed a verdict for the plaintiff for six cents damages only, and the judgment entered thereon having been affirmed by the General Term of the New York Superior Court, the plaintiff has appealed here, and it now maintains that the question of the amount of damages arising from the breach of the covenant should have been submitted to the jury. The plaintiff is the substituted trustee under the will of William H. Belden, deceased. Its predecessor executed the lease to the defendant for a term of three years expiring on the first of May, 1889. The lease contained a covenant against subletting or assigning on the part of the lessee, and also a covenant on his part that at reasonable hours in the daytime he would permit the lessor or his agent

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to show the premises to such persons as he desired for the purpose of selling or leasing the same, and that he would permit the usual notice of "To let" to be posted on the premises and to remain there without molestation. In November, 1888, the defendant vacated the premises and sublet them to a third party for a portion of the term remaining. This person being in possession refused to permit the posting of any notice and refused entrance to any one for the purpose of looking at the house with a view of purchasing or leasing the same. The house remained unoccupied and without being leased or sold until February 1, 1890, when it was leased for \$900 a year. Evidence was given that the rental value was in May, 1889, \$1,000 a year. When the house was vacated it was not in a habitable condition and repairs were made to it which consumed two or three weeks. In order to secure tenants and as soon as the lease expired, bills were put up and the house was continually offered for rent, without success, until February following. The plaintiff then brought this action to recover damages for the breach of the covenants not to sublet, and to permit the placing of the notice on the house and to allow the premises to be shown for the purpose of selling or leasing the same. The plaintiff recovered a verdict on the first trial, which was set aside upon appeal by the General Term, and upon the second trial the court directed the verdict of six cents as stated. The plaintiff now urges that the direct result of the violation of these covenants was the failure to rent the house from May 1, 1889, until February 1, 1890, and that damages might have been awarded to it by the jury on the evidence for that time at the rate of \$1,000 per year. The courts below have held as matter of law that the failure to rent could not upon the evidence be regarded as the natural or necessary consequence of the breach of his covenants by the defendant, and hence directed a verdict for nominal damages only. It is clear, and so it has been held in many cases, that the rule of damages should not depend upon the form of the action. In all civil actions the law gives or endeavors to give a just indemnity for the wrong which has

been done the plaintiff, and whether the act was of the kind designated as a tort or one consisting of a breach of a contract is on the question of damages an irrelevant inquiry. As was said by RAPALLO, J., in *Baker v. Drake* (53 N. Y. 211, 220), the inquiry is what is an adequate indemnity to the party injured, and the answer cannot be affected by the form of the action in which he seeks his remedy. In special cases where punitive or exemplary damages are allowed, an exception exists to the general rule of indemnity. (*Swain v. Schieffelin*, 134 N. Y. 471, 474.) It is a mistake, therefore, to say that liability for breach of covenant is less extensive than for that of tort, if cases of tort be excluded in which punitive damages are allowed.

In an action for a breach of contract the damages recoverable are those which the parties may fairly be supposed when they made the contract to have contemplated as naturally following its violation. (*Rochester Co. v. Parker Co.*, 135 N. Y. 209, 217.)

Speculative, contingent and remote damages are excluded.

The courts below have agreed that this is the true rule of damages, and in applying the rule to this case have held that the proof of damage and the cause thereof were too uncertain and speculative to authorize a recovery for any other than nominal damages; that there was no solid or substantial basis for the jury to find the fact that the refusal to perform the covenant was the cause of the loss of rent.

In using the words "uncertain, speculative and contingent," for the purpose of excluding that kind of damage, it is not meant to assert that the loss sustained must be proved with the certainty of a mathematical demonstration to have been the necessary result of the breach of covenant by defendant. The plaintiff is not bound to show to a certainty that excludes the possibility of doubt that the loss to him resulted from the action of the defendant in violating his agreement. In many cases such proof cannot be given and yet there might be a reasonable certainty founded upon inferences legitimately and properly deducible from the evidence that the plaintiff's loss was

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not only in fact occasioned by the defendant's violation of his covenant, but that such loss was the natural and proximate result of such violation. Certainty to reasonable intent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof. Such a result would be regarded as having been within the contemplation of the parties and as being the natural accompaniment and the proximate result of the violation of the contract. Regarding the purpose for which these covenants in the lease were inserted, it is obvious that two of them could only have been placed there to facilitate and aid the lessor in his efforts to obtain another tenant at the expiration of the lease with the least possible delay. Continuous occupation of premises is necessary in order that continuous rent may issue therefrom. In order to secure the renting thereof the custom has become substantially universal to place on the house itself a notice that it is "to let," and the showing of the house itself to would-be tenants is a necessity which evidence is not requisite to prove. In order to secure these privileges a landlord inserts the covenants in the lease. Can there be any doubt that parties, when inserting in a lease such covenants, contemplate the amount of rent which may be lost through the inexcusable refusal to fulfill them as a proper measure of damages? It would seem as if it were not only the most natural rule, but that none other could in truth have been in the minds of the parties. The proof may sometimes be rather difficult upon the question whether the damage was the just or proximate result of the breach of the covenant. In such case it does not come with very good grace from the defendant to insist upon the most specific and certain proof as to the cause and amount of the damage when he has himself been guilty of a most inexcusable violation of the covenants which were inserted for the very purpose of preventing the result which has come about. (*Wakeman v. Wheeler*,

etc., Co., 101 N. Y. 205.) Reasonable certainty is sufficient. The inference that the result followed because of the prior violation of the contract is sometimes a legitimate one and founded upon the evidence in the case. Looking at the object for which such covenants are inserted and the substantially universal custom adopted for the purpose of renting premises, and it would seem plain enough that the natural and obvious consequence of a breach might be the failure to rent. I do not say "must" be the failure to rent, because it is equally plain there would be a possibility of renting notwithstanding the breach of such covenants, and if the renting were accomplished there might be no damage sustained because of the breach. In a case, however, where there is a failure to rent, is the cause of such failure necessarily and in all instances so uncertain as to prevent any recovery of damages? I think not. To hold otherwise is to deprive the covenants of most of their value. If no damages are recoverable for their breach the plaintiff obtains very little security by reason of their insertion in the lease, and the defendant runs very little if any risk from their violation. Mere preventive remedies might be wholly inadequate. If the remedy for such a violation is confined to the preventive one by injunction much of the force and efficacy of these covenants will be taken away. For a short time prior to the first of May in any year in the cities of this state the season for renting houses exists. If during this season the lessor is engaged in litigation over the alleged breach of these covenants by the lessee it is easy to see how ineffectual the remedy by injunction might be. The season for renting is short at best, the plaintiff's allegations might be denied, and, though finally successful, the time spent even in a successful contest might use up the whole season. Various colorable compliances with the terms of the covenants might be practiced by the lessee, and if only prolonged a sufficient time the lease would terminate and the season end at the same period, and though it should finally be determined that the covenants had not in fact been complied with, it would be too late for redress to the plaintiff by any

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form of injunction or of equitable relief, and as the rule at law would in such case be to give but nominal damages, the plaintiff would be substantially without remedy, and the defendant would escape the proper consequences of his inexcusable refusal to fulfill his obligations. If, however, it be assumed that the plaintiff had an adequate remedy in equity and by injunction, that fact is no answer to his claim for the recovery of damages in an action based upon a violation of the covenants. That a party has an adequate remedy at law has been known to be a good answer to his prayer for relief in equity, but in an action at law to recover damages for a violation of his covenant by the defendant, it is no answer to set up that at one time the plaintiff had a remedy in equity which he did not avail himself of to prevent the violation of such covenant by defendant.

The learned court below seems to have assumed there was an inadequate remedy at law because of the impossibility of proving that the plaintiff suffered damage and the amount thereof by reason of the breach of the covenants by defendant, and hence equity provided a full and adequate remedy by injunction. We do not think there is any such impossibility of proof, or that there exists a perfectly adequate remedy in equity. To say that there may be cases where the damages recoverable for a breach of this class of covenants are not nominal only, but may be definite, certain and direct as the result of the breach, we do not mean to say that in all cases of such breach, followed by a failure to rent, the defendant would be liable for the amount of rent lost. The failure to rent might have no connection with the violation of the covenants. It might be so plainly the effect of some other and more potent cause that it would be the duty of the court to direct a verdict for the defendant upon such an issue. In other cases the question might be one for a jury to decide, under proper instructions from the court. The question as to what was the direct, immediate, proximate cause of damage is not always simply one of law. In the case at bar we think the plaintiff proved enough to require the submission to the jury

of the question whether the failure to rent was the direct result of defendant's violation of his covenants, and, if so, what amount of damage the plaintiff sustained by reason of such breach of defendant.

There was some dispute as to the rental value of the premises upon the trial, and as to the length of time (if at all) that the premises stood idle by reason of the acts of defendant, and these were questions which the jury should have been permitted to pass upon. They were not of so wholly uncertain, vague or speculative a character as to preclude their submission to a jury.

The plaintiff gave evidence tending to prove the violation of the covenants by defendant (indeed such violation is substantially conceded), and that directly in consequence of such violation the plaintiff suffered some loss of rent. The evidence on the part of the defendant was sufficient to raise a question of fact for the jury upon the issue whether defendant caused the damage, and, if so, in what amount. The jury should have been permitted to decide the question.

For these reasons we think the judgments of the courts below should be reversed and a new trial granted, with costs to abide the event.

All concur, except ANDREWS, Ch. J., not sitting.

Judgments reversed.

LEOCADIE A. V. CASSAGNE, Appellant and Respondent, v.
JAMES M. MARVIN et al., Trustees, etc., Appellants and Respondents.

Where a stockholder brings an action against his corporation and fails, the payment by him of the judgment for costs puts him in the same relations to the corporation that he had occupied before, and the directors may not resist an application for the transfer of his stock by setting up a claim that by reason of the suit the corporation was obliged to pay counsel fees and expenses in the litigation which were not covered by the taxable costs.

Certain holders of bonds secured by mortgage upon a hotel, which was being foreclosed, entered into an agreement with each other by which

defendants, who were parties to the agreement, were appointed trustees, and were authorized to purchase the property on the foreclosure sale and hold it for the benefit of those joining in the agreement. Defendants purchased the property, took a conveyance and entered into possession thereof; thereafter the parties to the agreement executed another instrument ratifying and confirming the trust and waiving all matters and things that could impeach or invalidate it. Defendants, as such trustees, under an arrangement with the contracting parties, issued to each a certificate for his share, transferable in form. On the back of each certificate was a printed form of transfer the same as that in common use with respect to certificates of corporate stock, to which a note was appended to the effect that a purchaser might receive a new certificate on return of the original to the trustees properly assigned. R., the holder of one of these certificates, duly assigned the same to plaintiff for a valuable and full consideration. Prior to the assignment, plaintiff agreed to purchase on condition that a new certificate in her name could be procured. She corresponded with defendants and was induced thereby to believe that there would be no difficulty in this respect, and thereupon she completed the purchase. On presentation of the assigned certificate defendants refused to issue a new one to plaintiff. At the time of the assignment a suit was pending brought by R. against defendants to recover a dividend alleged to be due for her share of the rents and profits. After the assignment said action was brought to trial, R. was defeated and a judgment rendered against her for costs, which she paid. Defendants incurred expenses in the action over and above the costs taxed, and in this action, brought to compel them to issue to plaintiff a new certificate, defendants claimed that plaintiff's certificate or interest was chargeable with such expense. *Held*, untenable.

Also, *held*, that without regard to the question as to whether the trust attempted to be created was a technical statutory one, defendants occupied a fiduciary relation toward the holders of the certificates, and having voluntarily assumed the obligation to issue new certificates to assignees of those originally issued, they were equitably bound so to do; that the relations, duties and obligations between the trustees and beneficiaries were analogous to those between stockholders of a corporation and its directors and officers.

(Argued June 22, 1894; decided October 9, 1894.)

CROSS-APPEALS from a judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 15, 1893, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This action was brought to compel defendants to issue to plaintiff a certificate of interest in the United States Hotel property at Saratoga Springs.

The facts, so far as material, are stated in the opinion.

Matthew Hale for plaintiff. The plaintiff was entitled to the relief prayed for in the complaint, irrespective of the question as to the validity or invalidity of the attempted trust under which the defendants claim to hold title to the premises. (*Thompson v. Simpson*, 128 N. Y. 270.) The whole scheme by which a trust was attempted to be formed by the subscribers to the so-called subscription agreement is void, and the several certificate holders take title to the property as tenants in common. (*Cook v. Platt*, 98 N. Y. 35, 39, 48; *Heermans v. Robertson*, 3 Hun, 464; 64 N. Y. 332, 340; *Heermans v. Burt*, 78 id. 259, 267; *In re Hall*, 24 Hun, 153; 1 R. S. at Large, 678, §§ 58, 59; *Fellows v. Heermans*, 4 Lans. 230, 238; *Holly v. Hirsch*, 135 N. Y. 590, 594, 596; *McArthur v. Gordon*, 126 id. 597; *Hutchins v. Van Vechten*, 140 id. 113.) The claim of a lien by the defendants in their answer herein, upon the share of said trust property formerly belonging to Mrs. Roche, or on said certificate representing said share, by Mrs. Roche assigned to plaintiff, for certain costs and expenses beyond taxable costs, alleged to have been incurred and paid by them in defending an action previously brought by Mrs. Roche against them for a dividend under said certificate, is untenable, and even if valid as against Mrs. Roche is wholly inadmissible in this action as a claim in favor of the defendants against the plaintiff here. (*Roche v. Marvin*, 92 N. Y. 398; *De Figaniere v. Young*, 2 Robt. 670, 672; Code Civ. Pro. § 502, subd. 1; *Canada v. Stiger*, 55 N. Y. 452; *Meyers v. Davis*, 22 id. 489; *Cummings v. Morris*, 25 id. 625.)

C. C. Lester for defendants. No express trust such as can be enforced specifically in equity was created, because no person having authority to dispose of the estate attempted to cre-

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ate such a trust. (*Selden v. Vermilyea*, 3 N. Y. 526.) The plaintiff having made the existence of a valid express trust the foundation of her claim for relief, and having demanded judgment for a specific performance of the alleged trust, cannot have judgment for a different cause of action, and the plaintiff cannot be permitted to deny the title of the trustees. (*Hudson v. Swan*, 83 N. Y. 552; *Paige v. Willet*, 38 id. 28; *Tell v. Beyer*, Id. 161; *Hall v. U. S. R. Co.*, 30 Hun, 375; *Getty v. Town of Hamilton*, 46 id. 1, 4; *Crosbie v. Leary*, 6 Bosw. 312; *Platt v. Stout*, 14 Abb. Pr. 178; *Arnold v. Angell*, 62 N. Y. 508; *Williams v. M. & T. Ins. Co.*, 54 id. 577; *Joslyn v. Joslyn*, 9 Hun, 388; *Hurst v. Harper*, 14 id. 280; *Van Cott v. Prentice*, 5 N. Y. S. R. 654; 104 N. Y. 45.) The defendants by the purchase at the foreclosure sale and the conveyance by the referee acquired an absolute title to the premises. (*Nicol v. Sands*, 131 N. Y. 24; *Stokes v. Recknagel*, 6 J. & S. 368; *Woolsey v. Funke*, 121 N. Y. 92; *Towar v. Hale*, 46 Barb. 361; *King v. Townshend*, 141 N. Y. 364; *Peck v. Mallams*, 6 Seld. 509; *Moses v. Livingston*, 4 N. Y. 208; *B. C. Inst. v. Bitter*, 87 id. 250; *Garfield v. Hatmaker*, 15 id. 475; *Sturtevant v. Sturtevant*, 20 id. 39; *McCartney v. Bostwick*, 32 id. 53, 59; *Everett v. Everett*, 48 id. 218; *Hurst v. Harper*, 14 Hun, 280; *Robertson v. Sayre*, 25 N. Y. S. R. 449.) Assuming that Marvin and Hall held the absolute title to the premises, as demonstrated in the preceding point, it was competent for them to recognize any equitable rights of plaintiff and secure them by a lawful declaration of trust. (*Foote v. Bryant*, 47 N. Y. 544; *Underwood v. Curtis*, 127 id. 538.) The defendant Marvin is not estopped by his letter of November 26, 1883, from refusing to issue a new certificate to the plaintiff. (*Bush v. Lathrop*, 22 N. Y. 535; *Ingalls v. Morgan*, 10 id. 178.) The court erred in refusing to allow the counterclaim set up by defendants. (*Paige v. Willet*, 38 N. Y. 28; *Tell v. Beyer*, Id. 161; *Getty v. Town of Hamlin*, 46 Hun, 1-4; *Van Cott v. Prentice*, 104 N. Y. 45; *Arnold v. Angell*, 62 id. 508; *Greenwood v. Marvin*, 111 id. 436; *Day v. Roth*,

18 id. 448; *Siemon v. Schurck*, 29 id. 598; *Gilbert v. Gilbert*, 2 Abb. Ct. App. Dec. 256; *B. N. Bank v. Duncan*, 12 Hun, 405; *Ryan v. Dox*, 34 N. Y. 309; *Carr v. Carr*, 52 id. 251; *Perry on Trusts*, §§ 125, 127, 407; *Lounsbury v. Purdy*, 18 N. Y. 518; *McArthur v. Gordon*, 126 id. 597; *Woodruff v. N. Y., L. E. & W. R. R. Co.*, 129 id. 27.)

O'BRIEN, J. In the year 1875 a mortgage of half a million dollars upon the United States Hotel at Saratoga, given to secure negotiable bonds to that amount then held by various parties, was in process of foreclosure. Judgment was entered in the action and the property was advertised for sale by a referee for the 1st day of May, 1875. On the fifteenth day of April preceding the day appointed for the sale, certain holders of the bonds, in order to prevent a sacrifice of the property, and for the purpose of protecting each other, entered into an agreement in writing with the defendants, who also held bonds, whereby the bondholders signing the instrument constituted the defendants trustees for the protection of their interest in the property. The defendants were thereby authorized as such trustees to purchase the property under the decree and to hold the legal title thereto as absolute owners, and to sell and convey and incumber the same by mortgage, lease or otherwise. In case the property was purchased by the trustees the bondholders subscribing the instrument promised and agreed with the trustees and each other that they would accept and receive the property so purchased, subject to certain chattel mortgages on the personalty in payment and satisfaction of their shares of the purchase price, and they released the trustees and the referee from all other and further payment. The subscribers also agreed to advance to the trustees sufficient funds to pay off and discharge certain liens upon the property, not extinguished by the judgment, and the interest in the proceeds of the sale of such bondholders as refused to become parties to the agreement. The trustees themselves were holders of bonds, and they were permitted by the agreement, which was not to take effect till holders of

bonds to the amount of \$400,000 had executed it, to have all the rights in the property, in proportion to their interests, as the others. In pursuance of the agreement, the defendants purchased the property at the referee's sale and took a conveyance of the same. Afterwards, and on the 10th of May, 1875, the persons who had executed the above-described instrument, including the trustees, signed another paper ratifying and confirming the trust expressed in the former writing, expressly admitting the validity of the trust and waiving all matters and things that could impeach or invalidate the same. By virtue of these instruments the defendants entered upon the care and management of said property and have ever since continued to act in that capacity. The trustees, under an arrangement with the persons interested in the property held by them, adopted the practice of issuing to each of them a certificate, transferable in form which, upon its face, expressed the interest which the person to whom it was delivered had in the property. In November, 1875, the defendants issued to one Eugenia Roche a certificate, No. 55 of the series, in which it was stated that she was entitled to a beneficial interest in the United States Hotel property at Saratoga, the legal title of which was held by them, amounting to \$997, upon the basis that the interest of all the beneficiaries amounted to \$454,505, subject to a mortgage lien of \$260,000, and that she was entitled to share *pro rata* with the other beneficiaries in the net rents and profits and entitled to her proportionate share of the proceeds in case of a sale. There was a printed form on the back of this certificate for the purpose of enabling the holder to transfer the same in the manner in common use with respect to certificates of stock, and a note appended to the effect that a purchaser might receive a new certificate upon the return of this to the trustees properly assigned. Mrs. Roche was one of the subscribers to the agreement under which the defendants entered into the control and management of the property, and similar certificates were issued by the defendants to the

other parties to these agreements for the purpose of showing their respective interests in the property. On November 24, 1883, Eugenia Roche assigned in due form this certificate to the plaintiff, using for that purpose the printed blank above described, and the plaintiff thereupon requested the defendants to transfer the same upon their books and to issue to the plaintiff a new certificate upon its surrender, and the defendants, after some correspondence, refused to comply with this request. The plaintiff agreed to pay a valuable and full consideration for the certificate and more than the face value stated thereon, believing that the defendants would transfer the same on the books and issue a new certificate therefor. Some time in the year 1883 Eugenia Roche commenced an action against the trustees defendants to recover a dividend of \$79.76, payable on the certificate held by her, as her share of the rents and profits of the property for the previous year. On a trial it was found that defendants had paid the dividend to her agent, and judgment was entered in the action for the defendants, with costs, which were taxed and adjusted at \$69.72, January 17, 1884. These costs were paid by the unsuccessful plaintiff in the action. An appeal was taken from this judgment to the General Term, and it was there affirmed, with \$81.62 costs, May 27, 1885. It has been found by the trial court that the defendants incurred expenses in defending this action, over and above the costs taxed in their favor, in the sum of \$254.48, and for defending the appeal, over and above costs, in the sum of \$209.60; and they insist that the certificate or interest held by the plaintiff and involved in the litigation is chargeable with such expense. The purpose of this action was to compel the defendants to transfer the interest represented by certificate No. 55, standing on defendants' books in the name of Eugenia Roche, to the plaintiff, who succeeded to her title by the transfer of the certificate on November 24, 1883, and to issue a new certificate in the name of the plaintiff. The defense, as I understand it, rests upon two propositions: (1) That the trust attempted to be created by the instruments referred to is inoperative and invalid. (2)

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That the expenses of the litigation between the original owner of the certificate and the defendants, over and above the costs paid, together with the costs of the appeal which are unpaid, are in equity a lien or charge upon the interest represented by the certificate which the defendants are entitled to have paid before transferring the interest on the books or issuing a new certificate. There is no finding that the transfer to the plaintiff of November 24, 1883, was in fraud of any claim which the defendants then had against the original holders of the certificate, or which was in process of ripening into a judgment, and we must, therefore, assume that on that day the plaintiff, by the execution of the assignment of the certificate, and by the acknowledgment and delivery to her of the same, became vested with the title to that share of the property represented thereby. The certificate was the evidence of the interest which the holder had in the property, and its transfer and delivery by the holder to the plaintiff in the manner prescribed by the trustees transferred the interest in the property. For the purpose of collecting the dividends and to facilitate the sale of the several interests in the market a transfer upon the books and a new certificate might be necessary. In the absence of some sufficient reason or excuse, it was the duty of the defendants to sanction the transfer by recording the same on the books and issuing a new certificate to the party to whom the interest had been transferred. This was a duty and obligation which the defendants owed to the bondholders or persons who became severally the beneficial owners of the property which the defendants had in their charge. It was necessarily involved in the relations between the trustees and owners created by the written instruments and the course of business adopted and acted upon by all. The plaintiff agreed to purchase the certificate from the original owner on condition that she could procure a new one in her own name. The correspondence with the defendants was such as to induce her to believe that there would be no difficulty on that point, and then she paid for the certificate a sum considerably larger than its face value. Subsequently

the trustees concluded to refuse to make the transfer unless the expenses of the litigation were paid. We do not think that the demand of the plaintiff can be successfully defended upon this ground. When Mrs. Roche paid the judgment for costs awarded against her she discharged all legal obligations which the defendants had against her or which they could enforce in any way against her property. In the absence of fraud she had the right to transfer her interest to the plaintiff on the 24th of November. After that date the defendants' duty to make the transfer and issue the new certificate was to the plaintiff. Concededly, they had no claim of any kind against her, and whatever their claim against Mrs. Roche might be in law or equity it did not attach to or pass with the certificate. While it may not be necessary now to decide the question, it seems to me that the expenses of the litigation beyond the costs which the defeated party was adjudged to pay were chargeable to the fund or property in the defendants' hands, and not to the share of the person who instituted the unsuccessful suit. If a stockholder brings an action against the corporation and fails, the payment by him of the judgment for costs puts him in the same relations to it that he had occupied before. The directors could not resist his application to transfer his stock by setting up a claim that the corporation, by reason of the suit, was obliged to pay out large sums for counsel fees and expenses in the litigation which were not covered by the taxable costs.

Nor do we think that it is necessary in this case to determine the nature or character of the trust. It may or may not be a technical statutory trust, but that question does not concern the defendants in the discharge of the obligations and duties which they owe to the certificate holders. It is not material to inquire where the legal title to the property is, whether in the trustees or the bondholders. The defendants are in possession of the property and in receipt of the rents and profits concededly for the benefit of the parties holding the certificates. They occupy towards them fiduciary relations. One of the obligations which they have voluntarily

assumed is that they will do certain things to facilitate the transfer from one to another of the certificates which they issued in order to show what interest the holders had respectively in the property and in order to enable themselves to properly perform the duty of management and care which includes the distribution and payment to the parties in interest of the rents and profits in the form of dividends. This duty and obligation the defendants do not deny. They admit in the broadest terms that they hold the property and are administering it for the benefit of such bondholders as signed the agreement and to whom the original certificates were issued, or their assignees. This was the view taken of the case by the court below.

So that, whatever view may be taken in regard to the precise legal relations that the defendants bear to the purchased property now held by them, it cannot be denied that by their written agreement and the practical construction given to it by their own acts, and the course of business adopted by them in the performance of the duties which they assumed, they were under an equitable duty and obligation to furnish to the beneficiaries the certificate containing the evidence of their right. The trustees in the care and management of the property had for many years regularly paid to the original holders of the bonds, or their assignees, dividends from the net rents and profits, and thus their several interests had become the subject of purchase and sale in the market, and the duties of the defendants, from the course of business that had been established under the written instruments, could not well be performed, in the sense that they were understood by all the parties, without instituting methods for the transfer of these interests on the defendants' books and to such parties as became the owners of the shares from time to time. This manner of transacting the business, if not fairly to be implied from the agreement, was adopted immediately after the defendants entered into the possession and management of the property, and adhered to for many years, so that now it can fairly be said to be a duty imposed upon the

defendants under the written instruments. In short, the relations, duties and obligations existing between the trustees and beneficiaries at the time of the commencement of this action were analogous to those that exist between the stockholders of a corporation and its directors and officers. The learned trial judge in his disposition of the case felt constrained to follow the General Term on a former appeal (*Cassagne v. Marvin*, 16 N. Y. St. Repr. 327), but at the same time he recognized the fact that the plaintiff in November, 1883, became the owner in good faith, and for a valuable consideration, of the share of Mrs. Roche, and that she purchased it in reliance not only upon the established course of business adopted by the defendants themselves, but also upon what was understood as a promise on the part of one of the trustees to make the transfer in the manner required. Finally, the learned counsel for the defendants insists that the complaint in this action is so framed as to give the action the form of one against trustees of an express trust to enforce the specific performance of a duty enjoined upon them as such, and the trust being void under the statute the action must fail. This result, we think, does not follow from the premises assumed. Whether the legal title is now in the trustees or the holders of the certificates the defendants owe certain duties of a fiduciary nature to them which a court of equity may properly enforce. It may be true that the plaintiff brought this action upon the theory that the trust was valid, but all the facts are alleged and found, and if they entitle the plaintiff to any relief the fact that she proceeded upon some erroneous legal theory applied to the facts will not defeat her right to such relief as the facts may warrant, if it is consistent with the complaint and embraced within the issue. (Code, § 1207.) The defendants do not deny or repudiate any of their obligations as expressed in the writings or created by the course of business. They simply claim that this particular certificate holder, on account of what had occurred before she purchased it and subsequently, is not entitled to have the transfer made upon the books or to a new certificate.

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As we think that this position is untenable for the reasons stated, the judgment must be reversed and a new trial granted, costs to abide the event.

All concur, except ANDREWS, Ch. J., not sitting, and FINCH, J., not voting.

Judgment reversed.

HENRY J. NEGUS, Respondent, v. LOUIS W. BECKER et al.,
Appellants.

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A party wall is for the mutual convenience and benefit of the adjoining property owners, and the only restriction upon its use by either is that such use shall not be detrimental to the other.

Plaintiff and K., being the owners of adjoining premises, entered into a contract by which the former agreed to erect upon their boundary line a brick wall with stone foundation, "of suitable size and dimensions to support a three-story brick building," K. to pay half the cost, and thereafter the wall to be owned jointly by the parties as a party wall. Plaintiff erected a two-story building and built the party wall of corresponding height. K. paid as required by the contract. K. conveyed his lot and interest in the wall to defendants, who entered into a contract with R. by which the latter agreed to erect a three-story brick building on their lot, R. to make use of the party wall and to carry it up another story. During the process of construction that part of the wall which was being carried up fell over on the roof of plaintiff's building. In an action to recover the damages no negligence was charged to defendants or the contractor R.; the latter was not made a party, and there was no evidence that the falling of the wall was due to any negligence in construction, or that it was not in all respects proper for the purpose. The court directed a verdict for plaintiff *Held*, error; that defendants had the legal right to increase the height of the wall to three stories, as contemplated by plaintiff's contract; and having provided for the work in a proper, lawful and usual way, and not having been shown guilty of any act contributing to the injury, were not liable.

It seems, that if the fall of the wall was caused by some negligence in its construction, the party liable therefor was R., not defendants.

Brooks v. Curtis (50 N. Y. 639); and *Schile v. Brokhahus* (80 id. 614), distinguished.

(Argued June 22, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon

an order made March 28, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

This action was brought by the plaintiff to recover damages of the defendants, for the injury occasioned to him by the falling of a brick wall, which was being erected, or carried up, upon a party wall between their premises. The plaintiff and one Krieger, being owners of adjoining lots of land, made a contract; by which the former agreed to erect upon their boundary line a brick party wall with stone foundation, "of suitable size and dimensions to support a three-story brick building." When completed, Krieger was to pay to plaintiff one-half of the cost of the wall and thereafter the said wall was to be owned jointly by the parties as a party wall. The plaintiff erected a two-story building, and built the party wall of corresponding height. Krieger made payment as required by the contract. Afterwards, Krieger conveyed his lot and his interest in the wall to these defendants; who made a written contract with one Robinson to erect a brick building upon their lot, of three stories in height.

Under this contract, Robinson was to make use of the party wall and, to meet the requirements of the new building, was to lengthen it, so as to cover a portion of the rear end of the boundary line, which plaintiff had failed to build upon, and was, also, to carry it up to a further height; for the accommodation of the third story. During the process of its construction, that part of the wall which was being carried up fell over upon the roof of plaintiff's building; causing the damage complained of. The complaint alleged that the defendants, in extending the party wall in the rear and in carrying it up another story, acted "without the knowledge or consent of the plaintiff." It charged no negligence to defendants, or to the contractor, and the latter was not made a party to the action. The demand was for a judgment in the amount of the damage sustained by reason of the falling of the wall.

Upon the trial there was no dispute about the facts. The defendants were not connected with the work of building,

other than through the contract with Robinson, and there was no evidence that the falling of the wall was due to negligence in construction, or that it was not a wall suitably built, and in all respects proper for the purpose. The trial judge denied defendants' motion for a dismissal of the complaint and granted the plaintiff's motion for the direction of a verdict for the amount of the damages proved. To these rulings defendants excepted and, subsequently, appealed to the General Term; where the judgment recovered by the plaintiff was affirmed. The defendants then appealed to this court and the only question argued in their behalf relates to the correctness of the rulings referred to.

William H. Henderson for appellants. The court erred in directing a verdict for the plaintiff. The plaintiff should have been non-suited. If there was any negligence, it was the negligence of Robinson, the contractor, and not the negligence of defendants. (*Engel v. E. Club*, 137 N. Y. 100; *King v. N. Y. C. & H. R. R. Co.*, 66 id. 181; *Hexamer v. Webb*, 101 id. 377; *Blake v. Ferris*, 5 id. 48, 58.) The wall which the plaintiff calls in his complaint and in his evidence his north wall, or the north wall of his building, was quite as much the defendants' wall as the plaintiff's. It was built at the joint expense of the adjacent lot owners. It was built for a party wall, and the defendants had the same right to build it higher in the construction of the building on their lot of which this party wall was to be a part, that they would have had if the wall had stood wholly upon their lot. (*Brooks v. Curtis*, 50 N. Y. 639.) An injury arising from inevitable accident is but the misfortune of the sufferer, and lays no foundation for legal responsibility. (*Harvey v. Dunlop*, Hill & Den. 194; *Booth v. R., W. & O. T. R. R. Co.*, 140 N. Y. 267; *Engel v. E. Club*, 137 id. 100.) If the falling of the wall complained of was by the act of God—an inevitable accident—then no foundation exists for legal responsibility to the plaintiff by any one whatever. (*Harvey v. Dunlop*, Hill & Den. 193, 194; *Center v. Finney*, 17 Barb.

94; *Bullock v. Babcock*, 3 Wend. 391; *Booth v. R., W. & O. T. R. R. Co.*, 140 N. Y. 267; *Engel v. E. Club*, 137 id. 100.) The defendants did nothing other than what was lawful and proper for them to do. There was no negligence on their part in entering into the contract with Robinson. A person in doing that which he has the legal right to do incurs no liability to any one except for negligence. (*Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 42; *Reed v. State*, 108 id. 407; *Blake v. Ferris*, 5 id. 48, 58; *Smith v. Wagner*, 15 Wkly. Dig. 284; *Brooks v. Curtis*, 50 N. Y. 639; *Schile v. Brokhahus*, 80 id. 614.)

Hudson Ansley for respondent. The action was properly brought against the defendants. (*Booth v. R., W. & O. R. R. Co.*, 17 N. Y. Supp. 336.) A party wall when built and standing becomes the joint property of the owners, and when once destroyed, the easement or right is gone, and there is no easement or right in the wall until built, and all land not used by the party wall reverts to the owner. (*Heart v. Kruger*, 121 N. Y. 386.) Either proprietor of a party wall may increase the height provided such increase can be made without detriment to the strength of the wall, or to the property of adjacent owners. But he does it at his peril. (*Brooks v. Curtis*, 50 N. Y. 639; *Musgrave v. Shepard*, 23 Hun, 669; McAdam on Landl. & Ten. [2d ed.] 166.) Where one proprietor of a party wall tears it down, he is a trespasser, and liable for all damage. (*Schile v. Brokhahus*, 80 N. Y. 614.)

GRAY, J. The direction of a verdict for the plaintiff proceeded upon the theory that, in undertaking to have the party wall carried up, in order to provide for the third story of their building, the defendants assumed an unqualified liability to the plaintiff for any occurrence in the course of construction, resulting in injury to him. There is no charge in the complaint, and there was no evidence to show, that the erection of this wall was something intrinsically dangerous, and, therefore, a matter which imposed upon the defendants a responsibility, in case of resulting damage to their neighbor, from which they

could not escape by any plea. The gravamen of the complaint seems to be in the proposition that, because the defendants extended the party wall to the full depth of the boundary line and carried it higher up, without the plaintiff's knowledge or consent, they did so at their peril and became absolutely liable, or insurers, for all possible injurious results. In the opinion of the General Term, upon the authority of *Brooks v. Curtis* (50 N. Y. 639) and of *Schile v. Brokhahus* (80 id. 619), it was held that it was unnecessary for the claim in the complaint to be based upon negligence; that, while the defendants had the right to use the wall as they did, they "insured the safety of the operation." "The party making the change," it was said, "is absolutely responsible for any damage which it occasions." We cannot agree with the court below in their view of the question, or that it is controlled by the authorities cited. *Schile v. Brokhahus* was an action for trespass, in tearing down a portion of a partition wall, and it was tried upon the theory, as Chief Judge CHURCH stated, "that the defendant, in disregard of the plaintiff's rights, commenced to tear down the old wall, claiming that it stood entirely upon his own land, and intending to erect a new wall for himself, without giving the plaintiff's property any benefit from it as a party wall, and that this was a trespass which caused the injury complained of." It was upon that theory that the jury found for the plaintiff and that the judgment was affirmed. *Brooks v. Curtis* was an action to compel the defendants to remove certain alleged encroachments, which consisted in making additions to the party wall. The plaintiff was held not to be entitled to relief, so far as the carrying up of the wall was concerned; but because, as the roof of the new building was constructed, it caused water, snow and ice to fall upon the plaintiff's building, the defendants were held to have been properly restrained from maintaining it in that condition. Judge RAPALLO made the following observation: "We think that the right of either of the adjacent owners to increase the height of a party wall, when it can be done without injury to the adjoining building, and the wall is clearly of sufficient strength to safely bear the

addition, is necessarily included in the easement. The party making the addition does it at his peril; and if injury results he is liable for all damages. He must insure the safety of the operation. But when safe it should be allowed. The wall is devoted to the purpose of being used for the common benefit of both tenants."

The argument is that this language formulated the rule of liability for this case. The respondent, in his brief, says: "Under the principle there enunciated, the appellants had a legal right to increase the height of the wall; but this was a conditional and not an absolute right. The condition is that he insures the safety of the operation." We think the opinion in *Brooks v. Curtis* has been quite misapprehended, in deducing from it any such rule of absolute liability, and that the language quoted, which is relied upon as furnishing the rule, should receive no such reading. In connection with the facts, it was appropriate. The "safety" there alluded to, which the building party insures, has reference to the strength of the wall to support the addition; or to the manner of its construction, as furnishing thereafter a possible source of danger, or of nuisance to the adjoining owner. It did not mean safety against uncontrollable accidents, or the results of some third party's negligence. This is clear from the reading of the balance of the opinion, as well as from a fair consideration of the question.

A party wall is for the mutual convenience and benefit of adjoining property owners and the only restriction upon its use by either is that that use shall not be detrimental to the other. In this case the wall was the joint property of the parties. It was built for the purposes of a building of three stories in height, and if the plaintiff did not avail himself of his right to erect a building of such a size, that fact was no obstacle to the defendants building it up, as it had been intended and agreed upon; in order that it might furnish a wall for their own three-story building. They were within the exercise of their legal right in what they did, and it is impossible to see that they assumed any risk in building a wall of the

height originally contemplated ; so long as they contracted for one of suitable strength and so adapted as to serve, when built, the purposes of the defendants' new building, without detriment to the enjoyment by the plaintiff of his premises. The plaintiff's agreement bound him to construct a party wall foundation sufficient for the purposes of a three-story building and he may not complain if the wall is carried up to subserve such a purpose. Had the defendants exceeded the height of three stories, it can then be seen that they might have become insurers of the safety of the wall ; for they would have been without the protection of the party wall agreement and they would have been undertaking to do a thing, which would possibly, if not probably, be hazardous, in view of the limitations as to strength under which the foundation wall was built.

The peculiarity of this case is that there is no question of negligence involved, and, for his recovery, the plaintiff insists upon the application of the principle that where one of two persons has sustained damage, the one that has caused it, or contributed to it, must make it good ; or that where an act is done for the benefit of one party, which damages another, the person to be benefited by the act insures the safety of the work and becomes answerable as an insurer. These principles are inapplicable and the difficulty with the position is that there is no restriction upon the lawful use by a party of his property, if he proceeds with due care in improving it. The defendants had the conceded right to carry up this wall, of which they were joint owners, for the use of their building and they provided for its erection in a lawful, proper and usual way. If there was negligence in the construction of the wall and its fall could be attributed, in any wise, to some negligent act of commission, or of omission, in the process of construction, it is very clear that the party liable for the resulting damage would be the contractor. By the contract between him and these defendants, he undertook to construct the wall. It was not a matter which the defendants were competent to engage in and, in contracting with Robinson, they placed themselves in a position, which exonerated them from

any responsibility for a negligent performance of the work. The performance of the work contracted for was neither dangerous, nor extraordinary, in itself, and, hence, the rule would apply that for an injury resulting to another, by reason of a negligent performance, the remedy would be solely against the contractor. The owner was innocent of any act contributing to the injury. We have lately discussed this doctrine in *Engel v. Eureka Club* (137 N. Y. 100). But, as it has been already observed, no negligence is charged, and the case was left to stand upon the sole proposition that, however innocent the defendants of causing the occurrence, and however lawful their undertaking to build up the party wall, they must, nevertheless, be responsible for what happened. This cannot be, and is not, correct doctrine. If the fall of the wall was through some negligence in its construction, or in securing it, the liability was the contractor's and not the property owners. If there was no such negligence and the fall was occasioned through some accident as, for instance, by the extraordinary force of the storm, which is mentioned, the defendants were not responsible. If, in the lawful use of one's property, injury is occasioned to an adjacent owner, which the exercise of due care could not have prevented, there is no remedy. An illustration of this rule is presented by cases of the excavation of land, which deprive adjoining premises of lateral support; (*Lasala v. Holbrock*, 4 Paige, 170); or, more recently, by the case of *Booth v. R. R. Co.* (140 N. Y. 267); where the damage was caused by blasting.

Here there was damage, admittedly; but there was no wrong. As the complaint was framed and as the case was tried, the fall of the wall was not laid to the fault of the defendants, or of their contractor, and, upon such a case, plaintiff should have been non-suited.

It is our judgment that the judgments below should be reversed and that a judgment should be entered in favor of the defendants, dismissing the complaint; with costs in all the courts to the appellants.

All concur, except ANDREWS, Ch. J., not sitting.

Judgment accordingly.

FRED C. EDDY, as Receiver, etc., v. LONDON ASSURANCE CORPORATION, Appellant, and GILES EVERSON, Respondent.

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The corporation defendant issued to plaintiff a policy of fire insurance on certain property. Defendant E. held mortgages on the property and was insured as mortgagee in the same policy, as his mortgage interest might appear. The policy contained provisions declaring it void in case the insured, without the consent of the company, procured other insurance or in case he permitted foreclosure proceedings to be commenced. In case of other insurance it was provided that the company should be liable for no greater proportion of the loss than the amount insured by the policy bore to the whole amount of insurance. The policy contained a "mortgage clause" to the effect that the insurance of E.'s interest should not be invalidated by any act or neglect of the mortgagor or owner of the property or by any foreclosure or other proceedings or notice of sale relating to the property; but that in case the company shall pay the mortgagee any loss, and shall claim that as to the mortgagor or owner no liability therefor existed, it, to the extent of such payment, should be subrogated to the rights of the mortgagee, or at its option may pay the mortgage debt and receive an assignment; no subrogation, however, to impair the right of the mortgagee to receive the full amount of his claim. During the term of the policy E. commenced an action to foreclose his mortgages, pending which a fire occurred. Judgment of foreclosure and sale was rendered, under which the property was sold, leaving a deficiency to more than the amount of the insurance. In an action upon the policy the insurance company claimed that E. having by his foreclosure and sale put it out of his power to subrogate could not recover. *Held*, untenable; that while the commencement of the foreclosure suit terminated plaintiff's interest under the policy, the insurance of E.'s interest was separate and distinct, and he took the same benefit as if he had received a separate policy, free from the conditions imposed upon the plaintiff; that E., therefore, violated no contract when he commenced the foreclosure, nor was he bound to stay the proceedings when the fire occurred, accept payment of the amount of insurance, and then assign to the extent of such payment his rights in the mortgages; but that as the subrogation agreement was upon condition that subrogation should not impair the mortgagee's right to recover the full amount of his claims secured by the mortgages, unless full payment was made, he had the right to proceed with the foreclosure and sell the premises.

Plaintiff, without consent of the insurers, obtained other insurance upon the property; this was done without the consent of E., and his interest was not insured. It was claimed by the company that in arriving at

the proportion of the loss to be paid to E. such other insurance should be reckoned as part of the insurance on the property. *Held*, untenable. In other policies the mortgagee clause contained the provision that the insurers would be liable only in proportion to the whole amount of insurance on the property issued to or held by any party having an insurable interest in the property as owner, mortgagee or otherwise. *Held*, that the meaning of this provision, taking into consideration the other provision that the insurance of the mortgagee should not be invalidated by any act or neglect of the owner, was that the insurance which should diminish or impair the right of the mortgagee to recover for his loss must be one issued upon his interest or to which he had consented, and so, his insurance could not be diminished by insurance without his assent or knowledge which did not include his interest.

When a contract contains provisions somewhat inconsistent, that construction will be adopted which, while giving some effect to all, will plainly tend to carry out the clear purpose of the agreement.

(Argued June 22, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 13, 1892, which affirmed a judgment in favor of the defendant Giles Everson, entered upon the report of a referee.

This was an action upon a policy issued by defendant December 17, 1887, which insured the building, elevator, etc., of the Syracuse Screw Company against loss and damage by fire for one year. The policy contained, amongst other provisions, the following: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy * * * or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise."

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy, or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto."

Attached to the policy was what is known as the New York standard mortgagee clause, containing, among other provisions, the following :

"Loss or damage, if any, under this policy, shall be payable to Giles Everson, as first mortgagee [or trustee], as interest may appear, and this insurance, as to the interest of the mortgagee [or trustee] only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy ; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee [or trustee] shall, on demand, pay the same."

"Whenever this company shall pay the mortgagee [or trustee] any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee [or trustee] the whole principal due to or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities ; but no subrogation shall impair the

right of the mortgagee [or trustee] to recover the full amount of his claim."

The further facts, so far as material, are stated in the opinion.

A. H. Sawyer for appellant. The five policies issued upon the Pearl street property became forfeited and void as to the plaintiff, prior to the fire, by reason of the procuring of the \$2,750 additional insurance upon said property, without notice to or consent of the companies issuing said policies. (*Allen v. G. A. Ins. Co.*, 123 N. Y. 6; *Landers v. W. Ins. Co.*, 86 id. 414; *Landers v. Cooper*, 115 id. 279; *Bigler v. N. Y. C. Ins. Co.*, 22 id. 402; *Gilbert v. P. Ins. Co.*, 36 Barb. 372.) All the policies issued by the defendant companies became forfeited and void prior to the fire by reason of the commencement, and the pendency, at the time of the fire, of proceedings for the foreclosure of the mortgages held by the defendant Everson upon the property covered by said policies. (*Titus v. G. F. Ins. Co.*, 81 N. Y. 411, 417; *Armstrong v. A. Ins. Co.*, 130 id. 560; *Short v. H. Ins. Co.*, 90 id. 16.) The defendant insurance companies, upon payment to the defendant Everson of the amount due under their policies of insurance, were entitled to be subrogated, to the extent of such payment, to all the rights of Everson, as mortgagee, under all securities held by him as collateral to the mortgage debt, as such securities existed on the day when the loss occurred. (*S. F. & M. Ins. Co. v. Allen*, 43 N. Y. 389; *U. C. S. Inst. v. Leake*, 73 id. 161; *Foster v. Van Reed*, 70 id. 19; *E. F. Ins. Co. v. R. Ins. Co.*, 55 id. 343, 359; *Kip v. M. F. Ins. Co.*, 4 Edw. Ch. 86; *C. F. Ins. Co. v. E. R. R. Co.*, 73 N. Y. 399; *Dick v. F. F. Ins. Co.*, 81 Mo. 103.) The agreement on the part of the insurance company to pay in case of loss is concurrent with the agreement upon the part of the mortgagee to subrogate the company, on such payment, to the extent thereof, to all his rights under securities held by him for the payment of the mortgage debt, and the defendant Everson, the mortgagee, having by foreclosure of the mortgages and the sale of the

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property subsequent to the fire, put it out of his power to subrogate the insurance companies to the rights which he had under such securities at the time of the fire, he cannot recover in this action against the defendants, the insurance companies. (*Lett v. G. F. Ins. Co.*, 52 Hun, 570; 125 N. Y. 82; *Fayerweather v. P. Ins. Co.*, 118 id. 324; *Dilling v. Draemel*, 16 Daly, 104; *N. I. F. Ins. Co. v. F. T. & T. Co.*, 123 Penn. St. 576.) The contract of insurance being one of indemnity merely where the interest of a mortgagee is specially insured as such, the insured would, on payment of the loss to the mortgagee, be entitled by law, irrespective of any agreement, to be subrogated to that extent to all securities held by the mortgagee for the payment of the debt. (*Ins. Co. v. Woodruff*, 26 N. J. L. 541; *A. F. Ins. Co. v. Tyler*, 16 Wend. 397.) The court below erred in holding that the other insurance upon the property held by the receiver of the Syracuse Screw Company, but not made payable to the mortgagee, should not contribute to the payment of the loss. (*S. F. & M. Ins. Co. v. Allen*, 43 N. Y. 394.)

Watson M. Rogers for respondent. The mortgagee clause provides for the payment of the loss to Everson as his interest may appear; "and this insurance as to the interest of the mortgagee (or trustee), only, thereon shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property." This furnishes a complete answer by him to the defense. (122 Mass. 165.) The claim that Everson should share with the Eddy policies is untenable. (*Adams v. G. Ins. Co.*, 9 Hun, 445-448; *Crow v. G. Ins. Co.*, 66 id. 54; *Titus v. G. F. Ins. Co.*, 81 N. Y. 410; *L. M. Co. v. S. F. Ins. Co.*, 88 id. 491.) The mortgagee clause constitutes an independent contract between the insurance company and the mortgagee, and enables him to recover, notwithstanding a violation of the conditions of the policy by the owner. (*Hastings v. W. F. Ins. Co.*, 73 N. Y. 141; *Eddy v. L. A. Co.*, 65 Hun, 307.) The mortgagee may make any contract with the insurer for the protection of his interests so far as they do not

impair the rights of the mortgagor. (*U. C. S. Inst. v. L. & H. Ins. Co.*, 73 N. Y. 161; *Foster v. Van Reed*, 70 id. 90.) He may collect the amount due on the policy, notwithstanding the property undestroyed is sufficient to pay the mortgage debt. (*E. Ins. Co. v. R. I. Ins. Co.*, 53 N. Y. 344.) Independently of the contract, the insurer has only an equitable right to be subrogated *pro tanto* to such rights as the insured himself has in respect to the mortgagee after receiving payment of the loss. (*Kernochan v. N. Y. B. Ins. Co.*, 17 N. Y. 428.) There must first be complete compensation. (Beach on Mod. Eq. Juris. § 818.) So, where the loss is less than the mortgage debt, the insurer to entitle itself to take the security, must pay the loss not only, but the balance on the mortgage. (Wood on Ins. 1073, § 496.) If the insurance companies desire the benefit of subrogation, either upon the principles of the common law or upon the agreement contained in the policy, they must first pay the mortgagee's debt, assert their right of subrogation, and themselves enforce the judgments which they have thus paid, and, as to the mortgagee, extinguished. (*F. N. Bank v. Wood*, 71 N. Y. 405; *Platt v. Brick*, 35 Hun, 121.) The regularity of Everson's procedure in these actions cannot be questioned or considered here, but that it was authorized is apparent. (Code Civ. Pro. §§ 501, 522, 1204; *M. T. Co. v. T. R. R. Co.*, 43 Hun, 521; *A. C. S. Inst. v. Burdick*, 87 N. Y. 40; *Carpenter v. M. L. Ins. Co.*, 93 id. 552.)

PECKHAM, J. The plaintiff commenced the above action against the corporation defendant upon a policy of fire insurance issued by the company by which plaintiff as receiver was insured against loss or damage by fire on certain property situated in Syracuse, and formerly owned by the screw company of that city. The defendant Everson was insured in the same policy as mortgagee, as his mortgage interest might appear. He was joined as defendant in order that the whole controversy might as between all the parties be settled at once.

Actions were also commenced against several other insur-

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ance companies by the plaintiff as receiver, at the same time and to recover upon policies covering substantially the same premises. The judgments in favor of the plaintiff in these other actions are also now before us for review. The questions arising affect generally all the insurance companies, although one or two of such questions are not raised in all the policies.

The plaintiff failed to recover, and his complaint was dismissed in the courts below because of the violation of provisions in the policies in regard to procuring other insurance without the companies' consent, and also because of the plaintiff's permitting foreclosure proceedings to be commenced to foreclose certain mortgages upon the insured premises. The plaintiff has not appealed.

The defendant Everson and the corporations defendant served cross-answers upon each other, Everson contending that he should be allowed to recover from the companies to the extent of his policies upon his mortgage interest in the premises, while the companies set up several defenses to such claim, which will be noticed hereafter. The cases were referred for trial and the referee reported in favor of Everson as against the insurance companies, and the judgments were affirmed at the General Term of the Supreme Court after a slight modification as to the amounts of the recoveries, and the insurance companies have appealed to this court. The only questions to be determined arise between defendant Everson and the companies. By the judgment entered upon the report of the referee it is provided in all cases that the insurance companies on making payment of the loss are entitled to be subrogated to the rights of the mortgagee, but such subrogation is not to impair the mortgagee's right to enforce the collection of his claim in full against the principal debtor, nor by means of any collateral security he may hold. This was placed in the judgments in accordance with the reports of the referee.

First. The companies urge that defendant Everson, the mortgagee, having foreclosed the mortgages upon the premises and sold the same under his judgment of foreclosure and sale subsequent to the time of the fire, has thereby put it out of his

power to subrogate them to the rights which he had under the securities held by him at the time of the fire, and he, therefore, cannot recover in this action against them. It appears that the Syracuse Screw Company was the original owner of the premises and it had given three several mortgages thereon, one dated August 13, 1881, for \$4,500; one dated November 3, 1883, for \$14,000; another dated June 30, 1885, for \$10,000. The defendant Everson on the 9th day of June, 1888, was the owner of all of these mortgages, and on that day commenced one action against the screw company to foreclose them. On the 23d of June, 1888, the screw company was dissolved and Eddy was appointed the receiver. The company was wholly insolvent and had no property other than the mortgaged premises. In July, 1888, Eddy, as receiver, duly appeared in the foreclosure action and served an answer setting up a defense to the \$10,000 mortgage. On the 4th of December, 1888, a fire occurred by which the property covered by the policies was damaged, and appraisers were appointed on the 18th of December, and on the 21st of Dec., 1888, they made their award by which they determined the damage resulting to the property from the fire to have been \$10,102.90. The companies refused to pay Eddy on the grounds already stated.

Everson severed his foreclosure action after Eddy put in his answer setting up a defense as to one of the mortgages, and on the 17th of Dec., 1888, obtained judgment by default for the foreclosure of the \$4,500 and \$14,000 mortgages, and decreeing a sale of the premises in satisfaction thereof. Subsequent to the fire, and on the 9th of January, 1889, the property was sold under the foreclosure judgment for the sum of \$15,400, leaving a deficiency on those two mortgages, including interest and costs, of \$4,921.86.

Each of the policies of insurance had a provision therein known as the "New York Standard Mortgage Clause," and under it the loss, if any, was made payable to defendant Everson, as his mortgage interest might appear. The clause contained a provision that the insurance of Everson's interest should not be invalidated by any act or neglect of the mort-

mortgagor or owner of the property, nor by any foreclosure or other proceedings or notice of sale relating to the property. The clause also contained the further provision that "when-ever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be there-upon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his claim."

The companies did claim that, as to the owner of the premises, no liability existed. They never in any manner consented to the institution of foreclosure proceedings.

At the time when they were commenced, June, 1888, no fire had occurred, and the defendant Everson was acting strictly within his legal rights when he commenced them. It must be assumed that the commencement of the foreclosure proceedings terminated any interest which Eddy might have had in the policies up to that time. There was, however, a separate and wholly distinct insurance of the interest of Everson in the property, and, by the terms of that contract of insurance, it was not to be affected by any act or neglect of the mortgagor or owner of the property, or by any foreclosure or other proceedings, or notice of sale relating to the property. The act which forfeited the interest of the owner in a policy was not to affect the interest of the mortgagee.

Consequently, the mortgagee violated no contract on his part when he commenced the proceedings to foreclose his mortgage, and thus endeavored to collect his debts. Before he had proceeded so far as a judgment of foreclosure a fire occurred. What was he to do? Was he bound to stay further proceedings and accept payment of the amount of his

insurance and then assign to the extent of such payment his rights in the mortgages to the companies? We think not. Such is not the meaning of the clause when read as a whole. Foreclosure proceedings were not to affect his rights. This was expressly provided for and agreed to. Although there was an agreement to subrogate, yet that agreement was also upon the condition that subrogation should not impair the mortgagee's right to recover the full amount of his claims. The two rights must be considered together, and though subrogation under certain circumstances may, under the agreement, be insisted upon, yet, unless payment of his mortgage debt is made, the mortgagee must have the right to proceed with the foreclosure and to a sale of the premises, for otherwise it could not be seen whether a subrogation prior to a sale would not impair his right to recover the full amount of the claim of the mortgagee.

If the insurers desired an immediate subrogation, then they had a right, by the terms of their contract, to pay the whole debt and take an assignment of the bond and mortgage and whatever other securities the mortgagee might have for the payment of his whole claim. Otherwise the insurers must wait if the mortgagee desire to continue the foreclosure. The right of the mortgagee to recover his full claim might be pretty sadly impaired if he had to subrogate at once, or, in other words, permit the insurers to collect out of his securities the very amount which they had paid him upon the policies issued to increase his security. It is not the mere right to prosecute which is not to be impaired, but the right to payment in full of his claim. This is not to be impaired by any claim of subrogation. Here is a very apt case in which to illustrate the point. The mortgagee sustains a loss upon the sale under the foreclosure decree of the two mortgages of nearly \$5,000. There is the third mortgage upon which judgment of foreclosure was obtained, and the amount found due thereon was \$12,474, and interest runs on that sum from January 15, 1890. The argument of the companies, if allowed, would lead to their sharing in the amount realized upon the

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foreclosure sale to the extent of the payments made by them on their policies, some ten thousand dollars, and the balance, some five thousand dollars, only would be realized by the mortgagee. In other words, he would receive no benefit whatever from the insurance, for the companies would take out of the proceeds of the foreclosure sale precisely the amount they paid him upon the policies of insurance.

What meaning is given to the words in the mortgagee clause, that no subrogation shall impair the right of the mortgagee to recover the full amount of his claim, if subrogation can be insisted upon under such circumstances? Insurance is taken for the purpose of increasing the security of the mortgagee. By the construction contended for by the companies there is really no such insurance. If the sale under foreclosure amounts only to the total of the insurance, but does not reach the full sum of the mortgagee's claim, the latter recovers nothing but the insurance money, while the companies are reimbursed their outlay from the proceeds of the foreclosure sale. They lose nothing, and only the mortgagee loses. This consequence is avoided, and, I think, was intended to be avoided, by the provision in question, which makes the right of subrogation dependent upon the fact that its exercise shall not in any manner impair the right of the mortgagee to full payment of his claim. Where the contract provided that it should not impair the mortgagee's right to recover the full amount of his debt, the right to recover meant the right to demand and to receive full payment of his debt or claim. If that right is not impaired by the insurers' right of subrogation, as claimed by them, it is impossible to say under what circumstances it would be impaired. We cannot recognize the correctness of this claim on the part of the insurers.

Second. Another question arises in regard to the so-called contribution. It seems that the plaintiff Eddy, without the consent of these defendant insurers, procured other insurance upon the property. This additional insurance thus procured rendered the policies of these insurers invalid as to the plaintiff. They contend, nevertheless, that in arriving at the pro-

portion of the loss payable by each of them to the mortgagee, this other insurance should be reckoned as part of the insurance on the property. It was procured by plaintiff without the consent or knowledge of the mortgagee, and was not made payable in any event to him, and did not insure his interest in the property. If the claim of these defendant insurers be allowed the effect is to reduce the amount which each is liable to pay to the mortgagee, and thereby to lessen his total recovery, as he has no claim under the other and additional policies. The clause under which this claim is made provides in the body of the policy that the insurer "shall not be liable for a greater proportion of any loss on the described premises than the amount thereby insured shall bear to the whole insurance, whether valid or not."

I think the courts below were right in rejecting this claim of the insurers. Taken in connection with the language in the mortgagee clause the contract is quite plain. The provision in the latter clause, that the insurance of the mortgagee should not be invalidated by any act or neglect of the owner of the property, applies, among others, to a case of other insurance of his own interest by the owner without the knowledge or consent of the mortgagee.

The effect of the mortgagee clause hereinbefore set forth is to make an entirely separate insurance of the mortgagee's interest, and he takes the same benefit from his insurance as if he had received a separate policy from the company, free from the conditions imposed upon the owners.

Where the company agreed that the mortgagee's insurance should not be "invalidated" by any act or neglect of the owner of the property, it was not intended to limit the application of that word to a case where the whole policy would otherwise be rendered invalid. The plain and obvious meaning of the language is that the insurance of the mortgagee should not be affected or in any wise impaired or lessened by any act or neglect of the owner. Although contained in the same policy issued to the owner, yet the insurer and the mortgagee were nevertheless entering into a perfectly

separate contract of insurance, by which the mortgagee's interest alone was to be insured and it would be most natural to provide that no act or neglect of the owner should invalidate, that is, impair any portion of the insurance thus separately secured. Can it for a moment be supposed that a mortgagee would otherwise ever consent to such a contract? His desire is to obtain security and to that end he insures his interest in the property. Would he knowingly consent that this security should be liable to be wholly frittered away and made valueless by the action of the owner, unknown to him, in procuring insurance upon the owner's interest in the property? Would any sane man agree to hazard his security in such a way? Would he agree that the value of his security should depend upon the acts of a third party over whom he had no control and of whose acts he might be wholly ignorant? The statement of the proposition is its best refutation. These views are supported by both of the opinions in the case of *Hastings v. Westchester Fire Insurance Co.* (73 N. Y. 141).

There is some difference in the verbiage of the clause in the reported case and that to be found in the clause under examination here. In the *Hastings* case the clause as to contribution contained the proviso that in case of other insurance, the *assured* should recover only a proportionate sum from defendant company. The owner of the property had mortgaged it to plaintiff's testator and had subsequently obtained an insurance upon his own interest as owner, and subsequent to that time the indorsement in favor of the mortgagee was made, and it was in the body of the policy issued to the owner that the language was used as to the *assured*. In the clause here under consideration it is seen that the word *assured* does not appear, and the condition is that in case of other insurance the company shall not be liable under the policy, etc. The court in the *Hastings* case thought the word *assured* referred to the person who was first insured when the policy was issued, and was not transferred to the mortgagee when he subsequently by a minute placed in the policy was made an assured also. This is very true, but a perusal of the

whole case shows that the controlling idea was a separate insurance of the mortgagee, freed from the conditions attached to the insurance of the owner, and not to be impaired or weakened by any act or neglect of such owner.

Force must be given to this positive language of the contract, and no act or neglect of the owner can be permitted to invalidate, *i. e.*, impair or weaken (73 N. Y. at 149) the validity of the agreement for the full amount named in the policy. By taking the insurance in the manner the mortgagee herein did, instead of taking out a separate policy, all the provisions in the policy, which from their nature would properly apply to the case of an insurance of the mortgagee's interest, would be regarded as forming part of the contract with him, while those provisions which antagonize or impair the force of the particular and specific provisions contained in the clause providing for the insurance of the mortgagee, must be regarded as ineffective and inapplicable to the case of the mortgagee. So when the agreement in regard to contribution, contained in the body of the policy issued to the owner, is compared with the specific statement in the mortgage clause, that his insurance shall not be invalidated by any act or neglect of the owner, we can only give the latter due force by holding that the insurance of the mortgagee is not, in effect or substance, to be even partially invalidated, *i. e.*, reduced in amount, and to that extent impaired and weakened by any act of the owner unknown to the mortgagee. In such case the general agreement in the body of the policy as to contribution does not, and was not, intended to apply. If it did, then the special and particular contract in the mortgage clause would be of no effect. If the two are inconsistent, the special contract particularly relating to the mortgagee's insurance, must take precedence over the general language used in the policy issued to the owner. For these reasons the claims of the insurers for a deduction in the amount of their liability cannot be allowed.

Third. As to three of the policies, the mortgagee clause itself contained the provision that the company was only to be

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liable in the proportion which the sum it insured should bear to the whole amount of insurance on the property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise. What meaning is to be attached to this provision after taking into consideration the language heretofore quoted that the insurance of the mortgagee will not be invalidated by any act or neglect of the owner of the property?

The act of obtaining this additional insurance was the act of the owner, and it was unknown to the mortgagee, and of course, not consented to by him. The additional insurance could by no possibility benefit him, as it was not upon any interest of his in the property. He could not, therefore, resort to any of these additional policies for his indemnity. It is not a case of contribution in any sense, but simply one, on the insurers' theory, of diminution of their liability, caused by the act of the owner and unknown, and with no possible corresponding benefit to the mortgagee. As a general principle it is settled that, before this apportionment of the loss between different companies can be demanded, the different policies must have been upon the same interest in the same property or some part thereof. (*Lowell Manfg. Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 592.) Has this principle been changed by this contract? Can it be that the mortgagee would knowingly consent to a diminution of this liability to an extent which might leave it of no value, consequent upon a secret act of a third party, and where by no possibility could he protect his security from such danger? All the reasoning given under the head last above discussed applies with equal force here, at least so far as the probabilities of entering into such a contract by the mortgagee are concerned. It is clear that the only object of the mortgagee is to obtain a security upon which he can rely, and this object is, of course, also plain and clear to the insurer. Both parties proceed to enter into a contract with that one end in view. In order to make it plain beyond question the statement is made that no act or neglect of the owner with regard to the property shall invalidate the

insurance of the mortgagee. . When, in the face of such an agreement, entered into for the purpose stated, there is also placed in the instrument a provision as to the proportionate payment of a loss, we think the true meaning to be extracted from the whole instrument is that the insurance which shall diminish or impair the right of the mortgagee to recover for his loss is one which shall have been issued upon his interest in the property, or when he shall have consented to the other insurance upon the owner's interest. This may not, perhaps, give full effect to the strict language of the apportionment clause, but if full effect be given to that clause, and it should be held to call for the consequent reduction of the liability of the insurers in such a case as this, then full effect is denied to the important and material, if not the controlling, clause in the contract, which provides that the insurance of the mortgagee shall not be injuriously "impaired or affected" by the act or neglect of the owner. As used in these mortgagee clauses, this is the meaning of the word "invalidate." (*Hastings v. Ins. Co.*, *supra*, at page 149.)

We must strive to give effect to all the provisions of the contract and to enforce the actual meaning of the parties to it as evidenced by all the language used within the four corners of the instrument. We are also at liberty to consider the purpose for which the contract was executed, where that purpose plainly and necessarily appears from a perusal of the whole paper. That construction will be adopted, in the case of somewhat inconsistent provisions, which, while giving some effect to all of them, will at the same time plainly tend to carry out the clear purpose of the agreement; that purpose which it is obvious all the parties thereto were cognizant of and intended by the agreement to further and to consummate. There is no equity in this claim on the part of the insurers, and we think, from a perusal of the whole clause in the policy, that it was not intended to and that it does not cover such claim.

The judgments of the Supreme Court must be affirmed, with costs in each case.

All concur, except ANDREWS, Ch. J., not sitting.

Judgments affirmed.

In the Matter of the Transfer Tax Upon the Estate of ELLA
S. HOFFMAN, Deceased.

By the will of H. she gave a fund of \$50,000 to trustees in trust to hold the same for the lives of the mother of the testatrix and of her daughter, the income to be paid to the mother for life and if the daughter survived, to her for life, the principal at the expiration of the trust to be paid to the issue of the daughter, if any living at her death, if none then to two nieces of the testatrix. The testatrix died leaving her mother, daughter and a child of the latter surviving. In proceedings before the surrogate to fix the amount of tax, under the Transfer Tax Act of 1892 (Chap. 899, Laws of 1892), it was decided that the value of the mother's life estate was less than \$10,000. *Held*, that under the provision of said act (§ 22) declaring that the words "estate" and "property," as used therein, shall "mean the property or interest therein of the testator" passing or transferred, not that "passing or transferred to individual legatees," etc., and that the word "transfer" shall "include the passing of property or interest therein in possession or enjoyment," the life estate of the mother did not come within the limitation in said act (§ 2) declaring that "such transfer of property shall not be taxable under this act unless it is personal property of the value of ten thousand dollars or more;" that the limitation applied to the aggregate value of all the property so transferred, not to the separate value of each several transfer; and so, that the mother's interest was taxable; but that the estates of the daughter and grandchild were not presently taxable, and could only be taxed when their rights became fixed and actual.

It seems, that said definitions do not affect the general nature of the tax imposed by the act as heretofore determined by this court; *i. e.*, that the tax is imposed upon the right of succession to property or estates which vest in the successors severally, and not upon the property or estate of the decedent; but they apply simply to provisions of the act, like the one fixing the limitation, where the word "property" is used by itself and to some extent ambiguously, and, therefore, needs the help of a definition.

(Argued June 19, 1894; decided October 16, 1894.)

APPEAL from so much of an order of the General Term of the Supreme Court in the first judicial department, made March 16, 1894, as reversed a decree of the Surrogate's Court of the county of New York, fixing the tax, under the Transfer Tax Act of 1892, upon the estate of Ella S. Hoffman, deceased.

This appeal only involves a fund of \$50,000 given by Ella

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| 148 | 327 |
| 148 | 318 |
| 148 | 327 |
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| 150 | 11 |
| 148 | 327 |
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| 154 | 114 |
| 148 | 327 |
| 167 | 233 |
| 167 | 234 |
| 148 | 327 |
| 171 | 54 |
| 171 | 519 |

S. Hoffman in trust to her executors and trustees to hold invested during the lives of her mother, Lucinda R. Starkweather, and her daughter, Ella A. Sandford, the income to be paid to the mother for life, and after her death to the daughter for life, if she survived the mother. On the death of the daughter, or if the mother should survive her, then on the death of the mother, the principal of the fund to go to the issue of the daughter, or in default of such issue then surviving, to two nieces of the deceased, or the respective personal representatives, in equal shares.

At the time of the death of the testatrix, her mother, daughter and a minor child of the latter survived her, all of whom are now living. The appraiser appointed appraised said fund as follows: The interest of the mother of the testatrix, \$9,385; the daughter, \$25,428; the remainder to the latter's minor child, \$15,187. The surrogate fixed the tax on these several estates at one per centum on the amounts so appraised. The General Term reversed the order of the surrogate as to the legacy to the mother of the testatrix, holding it to be exempt under the provision of the Laws of 1892 (Laws 1892, chap. 399, § 2), being less than \$10,000, and also held that the legacies from said fund to the daughter and her issue were improperly taxed at this time.

Emmet R. Olcott, Elihu Root and Edgar J. Levey for appellants. The property transferred to Lucinda R. Starkweather by the will of Ella S. Hoffman (dying November 7, 1892) was subject to the tax imposed by the "Act in relation to taxable transfers of property" of May 1, 1892, and not exempt from taxation and not included in the exceptions and limitations of that act. (*In re Howe*, 112 N. Y. 100; *In re Swift*, 137 id. 84; *In re Merriam*, 141 id. 484; *People v. E. T. Co.*, 96 id. 396; *P. Bank v. Billings*, 4 Pet. 514, 561, 563; *People v. Mayor, etc.*, 4 N. Y. 425; *People v. E. T. Co.*, 96 id. 396; *In re Prime*, 136 id. 347.) The tax on the life estate of Ella H. Sandford, the daughter of the decedent, and on the vested remainder of Olga Sandford, the grand-

daughter, was properly fixed by the surrogate under the act of 1892. (*In re Cager*, 111 N. Y. 344; *In re Stuart*, 131 id. 280; *In re Knoedler*, 140 id. 380; *In re Enston*, 113 id. 185.)

William Allen Butler and *Adrian H. Joline* for executors, respondents. The property passing to Lucinda R. Starkweather, the mother of the testatrix, is personal property of the value of less than \$10,000, and is, therefore, exempt from taxation under the statute. (Laws of 1892, chap. 399; Laws of 1885, chap. 483; *In re Cager*, 111 N. Y. 343; *In re Howe*, 112 id. 100; *In re Swift*, 137 id. 77.) The bequest of the income of \$50,000 to Ella H. Sandford, after the death of Lucinda R. Starkweather, is not taxable, because it is conditioned upon the contingency of the survival of Ella H. Sandford, and its present "fair market value" is incapable of ascertainment. (*In re Curtis*, 58 N. Y. S. R. 348.) The allowance of costs to the comptroller on the appeal to the surrogate was improper. (Code Civ. Pro. § 2561.)

Charles H. Daniels for Olga Sandford, respondent. The remainder devised by the fourth clause of the will of Ella S. Hoffman, deceased, is not susceptible of taxation. (*In re Curtis*, 58 N. Y. S. R. 348.)

FINCH, J. In construing the Inheritance Tax Law as it stood prior to the act of 1892, we had occasion to decide that it imposed a tax upon the right of succession to the property of the testator or intestate which vested in the successors severally and in their respective shares or proportions, and not upon the property or estate of the decedent. The shares received, in the hands of the recipients, were the measures of the right which was subjected to assessment, and the imposed tax could be enforced personally against the successor charged.

One effect of this construction manifested itself when a question arose over the provision which limited the assessment to estates of five hundred dollars or over. The inquiry was, what estate was meant; whether the aggregate estate passing from the testator or intestate, or the particular share passing to the suc-

cessor. We solved that problem in two cases. (*In Matter of Cager*, 111 N. Y. 344; *In Matter of Howe*, 112 id. 100.) In the first of these Judge RUGER said, somewhat curtly, that the tax was upon the individual, but in the second Judge DANFORTH explained that the scope of the enactment was to tax shares passing to their recipients; and the word "estate," to which the limitation of five hundred dollars was attached, must necessarily mean the estate received by the particular successor, and not that of the testator or intestate upon which as such and in the aggregate no tax was imposed.

The precise nature of the succession tax grew to be a very important subject of investigation when questions arose over property situated without the state, and led to some differences of opinion. *In Matter of Estate of Swift*, (137 N. Y. 77), Judge GRAY expressed his own doubts as to the true nature of the tax, but declared the judgment of the court to be that it is a tax on the right of succession under a will, or by devolution in case of intestacy; and the doctrine was confirmed and followed in the opinion of Judge BARTLETT, dealing with a legacy given to the United States. The general doctrine must, therefore, be deemed settled in this court unless it has been changed by the act of 1892.

Before that was passed, the scope of the statute had been extended by including within its operation not only shares and interests passing to collaterals, but also those passing to lineals; although as to the latter the rate of taxation was lessened, and a limitation imposed applying the tax only where the property exceeded in value the sum of ten thousand dollars. This provision raised the same question as to lineals which had previously been determined as to collaterals, viz., which property was meant; whether that passing from the decedent, or that passing to the particular successor. Of course, it was determined in the same way, and, by general consent scarcely needing adjudication, was held to mean the specific share passing to the successor. It was thus possible for a testator to avert the tax by reducing intended legacies of ten thousand dollars to lineals to a sum slightly below that amount.

The act of 1892 was a revision of the whole law on the subject. It was passed with knowledge of our decisions and in view of our construction, and was obviously intended in some respects to compel on our part different conclusions. I do not think there was any such purpose so far as our general doctrine as to the nature of the tax is concerned. There are some changes of phraseology in the more important sections, but I think it remains true that the tax is one upon the right of succession, levied upon successors in respect to the shares to which they succeed, and not upon the decedent's estate as such.

The question first presented on this appeal, relating to a life estate bequeathed to the mother of the testatrix, and valued at less than ten thousand dollars, must be decided, as it always has been in similar cases hitherto, in favor of the legatee, unless in that respect the law of 1892 has changed the necessary interpretation. But I think it has, and that such result was directly and consciously intended by the legislature. I put little reliance upon changes of phrase which do not necessarily indicate a change of legislative intent, but I am unable to understand the entirely new provision of section 22, unless its purpose is to compel a change of our previous construction, and require us to attach the limitation of ten thousand dollars of value to the estate of the decedent, and not to the several and particular estate passing to the successor. The material language of the section is this: "The words 'estate' and 'property,' as used in this act, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainer or vendor, passing or transferred to those not specifically exempted from the provisions of this act, and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees. * * * The word 'transfer,' as used in this act, shall be taken to include the passing of property, or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift in the manner herein prescribed." It will

be observed that the idea of the lawmaker is explained by declaring not only what the words "estate" and "property," as used in the act, shall mean, but also what they shall not mean; and the negation is a denial in terms of the precise construction which this court had previously adopted in determining what was meant by the word "estate," when used ambiguously and without qualifying words, as it was used in connection with limitations of value.

I recall that I have somewhere spoken of the danger of legal definitions, because almost always certain to prove incomplete and inaccurate, and those referred to are now relied upon and used to overturn and utterly reverse the whole scope and theory of the act as described in our decisions: for the appellant claims that by force of those definitions the tax is no longer upon the shares of individuals or their right of succession, but upon the property of the decedent in the hands of his executors or administrators. It would have been easy to have said that if such a reversal of our theory of the tax had been intended; but all through the act it is persistently declared that the tax is imposed, not upon the property of the decedent, but upon the transfer of that property to persons not exempt from taxation. It was useless, upon this point, to define the word "estate," for it does not appear at all in the first two sections which impose the tax. But the definition of the word "property" as being the aggregate transfer to the aggregated taxable transferees, cannot be applied to those sections generally without involving the statute in contradictions and utter confusion: for the aggregate transfer is clearly not taxed as such; it is constantly distributed into the separate transfers bearing different rates of taxation, chargeable severally against the several transferees, each made personally liable for his own tax, and that to be collected by executors and administrators severally and in due proportions out of the shares of each. The whole law is full of this distinction, provides for it in every direction, and would be a discord of difficult explanation if we applied the definition generally. Nothing, therefore, in these

definitions can be permitted to touch our general doctrine of the nature of the tax. But what then do they touch, and what purpose do they subserve? We must look for some place in the act where the word "property" is used by itself and to some extent ambiguously, and, therefore, needs the help of a definition. We find such a possible place in section two, where the phrase is, "unless it is personal property of the value of ten thousand dollars or more." That may mean the aggregate value of all the property transferred to taxable persons, or the separate value of each several transfer. We had said that it meant the latter, but now comes the legislature declaring that the word "property" shall mean what passes to those not exempted, and not what passes to individual transferees. While the prohibition cannot apply to the general theory of the tax, it can apply to this description of a specific limitation. We had said it related to the property of individual transferees, but that construction section 22 was intended to forbid and to prevent. If it does not mean that I am unable to perceive any office it can perform or any useful purpose it can subserve. That effect, I think, we are bound to give it, since we can do so without disturbing the scope of the act, and in view of the legal situation which existed and the possible evil which it was thought prudent to prevent. And so we are prepared to say that the interest of the mother is taxable at one per cent, although itself of a value of less than ten thousand dollars, because the aggregate transfers by the will to taxable persons exceeded that amount.

As to the estates of the daughter, Ella, and the granddaughter, Olga, we agree with the conclusions of the General Term. By the will the mother took a life estate. If upon her death Ella survives, the latter will take a life estate, but if she dies before her mother Ella will take nothing and have no estate to be taxed. In that event there will have been no actual transfer to her of any portion of the property of the decedent. She ought not to be taxed until events make it certain that there is an actual and beneficial transfer of the property to her. The remainder goes to Olga if she is living

at the death of her mother, but if she is then dead without issue that remainder goes to certain nephews and nieces. If it goes to her it will be taxable at one per cent, but if to the collaterals then at five per cent. Until events determine the question it cannot be known what tax is chargeable nor by whom it is payable. Our decision in *Matter of Curtis*, (142 N. Y. 219), is not decisive because the facts are essentially different, but in that case I expressed what was our decided drift of opinion in cases more like the present, and was fairly settled later in *Matter of Estate of Roosevelt*, (143 N. Y. 120). We are obliged to follow one of two lines of construction. We must open all the nice and difficult questions which arise under a will as to the vesting of technical legal estates although future and contingent, and assess the tax upon what are in reality only possibilities and chances, and so complicate the statute with the endless brood of difficult questions which gather about the construction of wills; or we must construe it in view of its aim and purpose and the object it seeks to accomplish, and so subordinate technical phrases to the facts of actual and practical ownership. For taxation is a hard fact, and should attach only to such ownership, and may properly be compelled to wait until chances and possibilities develop into the truth of an actual estate possessed, or to which there exists an absolute right of future possession. I am not shutting my eyes to the statutory language, which is quite broad. The property taxed may be an estate "for a term of years or for life or determinable upon any future or contingent estate," or "a remainder, reversion or other expectancy," and the tables of mortality may be resorted to for the ascertainment of values. And yet, it is the "fair market value," the "fair and clear market value" which is to be assessed, and with the proviso that if that value cannot be at once ascertained the appraisal is to be adjourned. I can scarcely imagine a contingency depending upon lives which mathematics could not solve by the doctrine of chances and the averages of mortality, and there could hardly be an adjournment unless upon some rare contingency having no averages, and the results in cases

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Statement of case.

dependent upon lives might still leave the "fair and clear market value" in doubt and yield sums which no sale in the market would produce. My judgment is further guided by the very significant definition of the word "transfer" in section 22. It "shall be taken to include the passing of property or any interest therein in possession or enjoyment present or future." It thus contemplates a present enjoyment or a fixed and absolute right of future enjoyment and adjourns the appraisal until the fulfillment of contingencies leaves those results attained.

Here there must be that adjournment until the rights of Ella and Olga become fixed and actual. The result does no injustice to the state. The trust fund must remain in the hands of the executors to feed the life estates and for payment over of the remainder. The executors must pay the tax when they know against whom it is chargeable and the rate to be assessed. The state will get its tax when the legatees get their property.

The order of the General Term should be modified by declaring the life estate of the mother taxable as decreed by the surrogate, and, as modified, affirmed, without costs to either party.

All concur, except ANDREWS, Ch. J., not sitting.

Ordered accordingly.

THE PEOPLE ex rel. P. J. MARSH, Appellant, v. FRANK CAMPBELL, as Comptroller, etc., Respondent.

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144 481

On application to the state comptroller under the statute (§§ 68, 69, 70, chap. 427, Laws of 1855) for the redemption of a tract of land containing 5,455 acres, sold for unpaid taxes, it was claimed by the appellant that one D. had been an actual occupant of part of said land during the two years subsequent to the delivery of the comptroller's deed, and no notice to redeem had been served upon him. It appeared that D. occupied a loghouse on an island in a lake included in the tract as a hunting camp at irregular intervals, and without any use of the mainland, except to roam over it in pursuit of game. *Held*, that this did not constitute actual occupancy within the meaning of the statute, and so that the application was properly denied.

The application was made by one M.; the papers did not show that he had any interest in the premises. *Held*, that the provision of the act (§ 70) providing that "the occupant or any other person * * * may redeem the said land," did not permit a stranger to the title to intervene, but only included "any other person" having, or claiming in good faith to have, such substantial interest in the premises as would entitle him to redeem; and so, that the applicant was not entitled to redeem.

(Argued October 8, 1894; decided October 16, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made November 22, 1892, which affirmed a determination of the comptroller of the state of New York denying an application for the redemption of certain lands from a sale for unpaid taxes.

The facts, so far as material, are stated in the opinion.

A. D. Wait for appellant. The denial by the comptroller of relator's application to redeem was erroneous, and should be reversed. The application should have been granted. (2 R. S. [8th ed.] 1137, 1141; Laws of 1891, chap. 21; *Bush v. Davidson*, 16 Wend. 550-553; *Leland v. Bennett*, 5 Hill, 286; *Bank of Utica v. Mersebau*, 3 Barb. Ch. 531, 581, 582; *Smith v. Sanger*, 3 Barb. 360; *Lucas v. McEnema*, 19 Hun, 14; *Hand v. Ballou*, 12 N. Y. 542; *Calkins v. Chamberlain*, 37 Hun, 163; *Smith v. Sanger*, 4 N. Y. 576; *Thompson v. Burhans*, 79 id. 95; *Stewart v. Cryslar*, 100 id. 378; *Tweed v. Metcalf*, 4 Mich. 586; *Callanan v. Raymond*, 75 Iowa, 307; *C. H. L. Co. v. Randall*, 82 id. 89; *Regina v. P. A. Co.*, L. R. [2 Q. B. Div.] 588; *Rush v. Davidson*, 16 Wend. 550; *Comstock v. Beardsley*, 15 id. 348, 349.) The comptroller was mistaken in assuming that the precise point under the statute of 1885 had never been decided by the courts. (Laws of 1850, chaps. 108, 298, §§ 86, 92; 1 R. S. [6th ed.] 967, §§ 113-118; 2 id. [7th ed.] 1030, §§ 68-74.) The right to redeem the lands in question upon the terms prescribed by the law is by the express terms of the statute given to any person. (*In re N. Y. C. & H. R. R. Co.*, 90 N. Y. 342.)

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T. E. Hancock, Attorney-General, for respondent. The contention of relator that the land in question was occupied and consequently the comptroller was required to serve notice upon the occupant, is erroneous. (Laws of 1855, chap. 427, § 68; 2 R. S. [8th ed.] 1141.) The land in question was not in the actual occupancy of any person, and notice to redeem was not required to be served by the comptroller. (*Comstock v. Bradley*, 15 Wend. 348; *Smith v. Sanger*, 4 N. Y. 577; *Churchill v. Onderdonk*, 59 id. 134; *Brister v. Burr*, 120 id. 427; *Miller v. L. I. R. R. Co.*, 71 id. 380; *Price v. Brown*, 101 id. 669; *Roberts v. Baumgarten*, 110 id. 380; *Shaver v. Magraw*, 12 Wend. 558; *Lane v. Gould*, 10 Barb. 254; *Redfield v. U. & S. R. R. Co.*, 25 id. 54; *Miller v. Downing*, 54 N. Y. 631; *Gouverneur v. N. I. Co.*, 11 N. Y. Supp. 87; *Roe v. Strong*, 107 N. Y. 350; *Greenleaf v. B. F. C. I. Co.*, 141 id. 395.) The writ of certiorari herein should be quashed for the reason that the party applying for same was not entitled to review the determination of the comptroller. (Code Civ. Pro. § 2127.)

BARTLETT, J. This is an appeal from an order of the General Term, third department, upon certiorari to review a determination of the comptroller of the state of New York denying an application for the redemption of certain lands sold for unpaid taxes, affirming the decision of the comptroller. The tax sale of some five thousand four hundred and fifty-five acres in Hamilton county took place in 1881, and premises were bid in by the People of the state. A subsequent tax sale of a larger tract of land in 1885 included the same premises as sold in 1881, and the People of the state were the purchasers at the sale. The comptroller conveyed to the People, under separate deeds, the premises sold at each of these sales. The relator seeks to redeem the five thousand four hundred and fifty-five acres, upon the ground that one Alvah Dunning had been the actual occupant of a part of said premises from 1875 to a period subsequent to the delivery of the comptroller's deeds, and that no notice had been served upon said occupant affording the opportunity to redeem as

required by law. (Ch. 427, Laws 1855, §§ 68, 69, 70 ; 2 R. S. [Banks' 8th ed.] 1141.)

The decision of the General Term, that the occupancy by Dunning of a loghouse located on a island in the Eighth lake of the Fulton chain as a hunting camp, at irregular intervals and without any use of the mainland, except to roam over it in pursuit of game, did not constitute actual occupancy under the statute, meets with our approval, and we should adopt the opinion below did we not deem it our duty to call attention to an additional reason for affirming the order appealed from.

The application to redeem the premises in question was made to the comptroller by P. J. Marsh, the relator, who signs the same "P. J. Marsh, Agt." The application does not disclose that Marsh had any interest in the premises sought to be redeemed, nor does the record show the meaning of the word "Agt." after the signature of the relator to the application to redeem. The relator's right to intervene is rested upon section 70 of chap. 427, Laws 1855, already referred to. This section reads: "The occupant or any other person may, at any time within the six months mentioned in such notice, redeem the said land," etc. It is insisted that the proper construction of this section entitles any person to redeem, although an entire stranger having no interest in the premises.

This section admits of no such construction, and its general phraseology was designed to include any other person than the occupant having, or claiming in good faith to have, such substantial interest in the premises as would entitle him to redeem. The pernicious practice that obtains of permitting a stranger to the title to intervene and set the machinery of the comptroller's office in motion in order that he may redeem lands sold for taxes has no foundation in law.

We affirm this order on the grounds that no part of the premises sought to be redeemed had an actual occupant in contemplation of law, and that the relator has no legal standing in this proceeding and is not entitled to redeem.

The order should be affirmed, with costs.

All concur.

Order affirmed.

JOHN T. BARNARD, as Temporary Administrator, etc.,
Respondent, v. SUSAN E. HALL et al., Impleaded, etc.,
Appellants.

The complaint in an equity action was dismissed on trial. On appeal the judgment was reversed. The order of General Term was affirmed on appeal to this court, and upon defendants' stipulation judgment absolute was ordered for plaintiff, with costs (140 N. Y. 250). *Held*, that upon filing the remittitur, the Special Term had power to award costs and an extra allowance; that while under the order of affirmance the costs awarded were the costs in this court only, as the case was one where the costs and an extra allowance were in the discretion of the court below, it was proper for the court to award them in ordering final judgment.

(Submitted October 8, 1894; decided October 16, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made May 14, 1894, which affirmed an order of Special Term directing judgment in favor of plaintiff to be entered upon a remittitur of the Court of Appeals.

The facts, so far as material, are stated in the opinion.

Boothby & Warren for appellants. Costs in equity actions are not a matter of right, but are governed by section 3230 of the Code of Civil Procedure. (*Phelps v. Wood*, 46 How. Pr. 1; *Block v. O'Brien*, 23 Hun, 82; *Sisters of Charity v. Kelly*, 68 N. Y. 628; *In re Water Comr., etc.*, 104 id. 677; *Thomas v. White*, 50 Hun, 441.) The Special Term should not have granted costs against the appellants. (*People v. N. Y., L. E. & W. R. R. Co.*, 14 N. Y. S. R. 168.) The Court of Appeals had the power to award costs of the trial term, but they did not do it. (*Freney v. Smith*, 126 N. Y. 658.) The Special Term erred in granting an extra allowance against appellants. (*Eldridge v. Strenz*, 7 J. & S. 295.) No affidavit was furnished by the moving parties on this motion for an extra allowance. The court should be furnished with an affidavit of facts sufficient to enable it to form an opinion

on the subject. (*Howe v. Miner*, 4 How. 252.) The only judgment asked for against the appellants was to reform the trust deed. (*Lyon v. Belchford*, 8 Civ. Pro. Rep. 229.) Upon a remittitur being filed in the court below, the latter court has no power to render any other judgment than one simply adopting that of the Court of Appeals as its own. (*McGregor v. Buel*, 1 Keyes, 153.) The order is appealable. (*Connaughty v. S. C. Bank*, 92 N. Y. 401; *Comrs. v. Bd. Suprs.*, 64 id. 626.)

E. B. Barnum and *George G. Barnard* for respondent. The appeal from so much of the decree as declared the trust deed of August 24, 1883, and the instrument of April 2, 1884, filling a vacancy and purporting to affirm the trust deed, should be dismissed. (*Barnard v. Gantz*, 140 N. Y. 255; *Wilkins v. Earle*, 46 id. 358.) The costs and allowance were properly awarded. (*Parrott v. Sawyer*, 26 Hun, 466; *Helck v. Reinheimer*, 14 N. Y. S. R. 465; *Brown v. F. L. & T. Co.*, 24 Abb. [N. C.] 160.)

Per Curiam. The action was brought by plaintiff's intestate to reform a certain trust deed relating to her property and, upon her death, it was continued by plaintiff. At the Special Term the trial resulted in a dismissal of the complaint; but, upon appeal, the General Term reversed the judgment in favor of the defendant and ordered a new trial, with costs to abide the event. From their order the defendants appealed to this court, where the judgment was affirmed, and, under the stipulation of the defendants, judgment absolute was ordered by this court for the plaintiff, with costs. (*Barnard v. Gantz*, 140 N. Y. 255.) After filing our remittitur, the plaintiff moved for entry of judgment thereon and for an extra allowance of five per cent. An order was entered, which, after making the judgment of this court the judgment of the Supreme Court, proceeded specifically to order the relief to which the plaintiff was entitled under our decision, and, further, granted "an extra allowance

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of \$1,100, in addition to costs which are to be hereafter taxed by the clerk," etc. The defendants and appellants insist that the Special Term had no right to order costs, or an extra allowance, and that in so ordering and in formulating the equitable relief, which the plaintiff should have, the court below has gone beyond, and has not conformed exactly to, the order of this court. Under our order, the costs awarded were the costs in this court only; but, as the action was one where costs were in the discretion of the court, it was proper for the court below to award them in ordering the final judgment for the plaintiff, which our decision entitled him to. The discretion, with which the court is invested by the statute, could competently be exercised then. Nor was the granting of the extra allowance an erroneous exercise of power. The terms of our order did not preclude the court below from awarding the costs or the allowance. It was within its discretion to award them, upon the new trial resulting successfully to the plaintiff if it had been had, and, under the course taken by the defendants, upon the recovery by the plaintiff of an order for an absolute judgment, the court still had the power to determine the questions of costs and of allowance. The amount of the allowance was in the discretion of the court and there has been no abuse in its exercise. As to the specific equitable relief granted by the court below, in its order for judgment, we think it was in conformity with our decision and correctly carried it into effect.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

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166 57JOHN J. P. READ, Appellant, v. CHARLES N. BRAYTON,
Respondent.

The owner of a chattel may in general replevy it from any person who has it in his possession and who has no right to retain it as against him. In an action brought by plaintiff against a bank to recover the amount of two certificates of deposit issued by it to him, the bank alleged that the certificates were in the hands of one R. as part of the assets of the estate of his deceased wife, and that they belonged to that estate. On the trial the certificates were produced by R. on a subpoena *duces tecum*, and were put in evidence by plaintiff, for whom the court directed judgment on the certificates, and ordered that they be deposited with the clerk of the court, to be retained until the further order of the court, he to indorse thereon that they were in judgment against the bank. The judgment was reversed on appeal to this court (136 N. Y. 154) on the ground that plaintiff was not in a position to surrender the certificates. At the expiration of his term of office the then clerk delivered the certificates to defendant here, his successor in office. In an action of replevin, brought to recover possession of the certificates, an order was granted perpetually restraining the prosecution thereof. The title of plaintiff to the certificates was not questioned, and it was admitted that they were in defendant's custody, and that he refused to deliver them up. *Held*, that the order was erroneous; that the court below had no authority to impound the certificates and place them beyond the reach of a writ of replevin at the suit of the true owner; that the reversal of the judgment rendered any further control of the certificates by the court or its officers unnecessary, and that the direction of the trial court in the former action, that the certificates be retained by the clerk until the further order of the court, clothed the clerk with no immunity from liability in this action, as the direction was a nullity both as against R. and plaintiff.

The principle that where the court has in the administration of justice gained possession through its receiver or other officer of the property in litigation, it is deemed to be in the custody of the law, and this cannot be disturbed without permission of the court, has no application to such a case; it applies only where there is a lawful possession under a lawful order of the court.

It seems, a receiver or other officer of the court is not protected against replevin or other common-law action brought by a third person claiming paramount title to property in his possession as receiver.

Even where property is in the custody of the law it is a matter of course for the court, on application made in good faith, to permit suit to be brought by a third person claiming rights therein, and if action has been

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Statement of case.

brought without such permission the court will, if the conduct of plaintiff has not been willful, permit the action to proceed.

Also *held*, that plaintiff was not bound to procure the appointment of representatives of the estate of Mrs. R., and apply to have them brought in as defendants; that whatever might be done to procure the substitution as defendant of the real claimant of a title hostile to that of plaintiff must be done by defendant.

(Argued October 8, 1894; decided October 16, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 3, 1893, which modified and affirmed as modified an order of Special Term which perpetually restrained the further prosecution of this action.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edmund P. Cottle for appellant. The order made at General Term was on the sole ground that it was in the nature of a contempt to replevy from and bring an action against the clerk of the court without leave. No other claim of irregularity in plaintiff's practice is made. The court erred in applying the rule in question to replevin. Replevin should not be enjoined for any such reason. (*Clark v. Skinner*, 20 Johns. 468; *Hills v. Parker*, 111 Mass. 508; *C. E. Bank v. Blye*, 101 N. Y. 303; *Read v. M. Bank*, 136 id. 462; *C. N. Bank v. I., etc., Bank*, 44 Hun, 386, 392; *Berrick v. Berrick*, 21 Barb. 24; *Colson v. Arnot*, 57 N. Y. 260; *Magee v. Scott*, 9 Cush. 148, 151; *Hedges v. Seeley*, 9 Barb. 214; 17 N. Y. 208; *State v. Davis*, 1 Black, 101; *Van Winkle v. N. J. M. S. Co.*, 37 Barb. 122; *Wilson v. Anderson*, 1 B. & Ad. 122; 2 Hilliard on Torts [1st ed.], 248, 254.) The Special Term order was also erroneous because, not only were the parties named unnecessary, but even improper. Code of Civil Procedure, section 452, does not apply to actions of replevin, or claim and delivery. (*King v. Seed Co.*, 25 N. Y. Supp. 1115; 123 N. Y. 532, 538, 540; *Lynch v. St. John*, 8 Daly, 142; *Chapman v. Forbes*, 123 N. Y. 538; Code Civ. Pro. §§ 1709,

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1710.) Where an affidavit on a motion asserts a fact positively it can only be controverted by an equally positive denial or by stating facts upon the affiant's knowledge tending to disprove the facts asserted. (*Simmons v. Craig*, 17 N. Y. Supp. 24; *Sullivan v. Gilroy*, 8 id. 401; Code Civ. Pro. § 1712.) The fact that a party may possibly be subjected to a double recovery in the same matter in suits by adverse claimants, is not a reason for denying relief to a claimant who comes into court alleging and proving his right to the thing demanded. (*E. G. L. Co. v. McKeige*, 139 N. Y. 237; *C. E. Bank v. Blye*, 101 id. 303, 306.) It is the spirit and policy of the Code and the law to require in the case of an injunction, or in replevin where a party desires to retain possession of the property in dispute, the giving of sufficient security to protect the opposite party from any damage he may suffer by reason of such injunction or loss of possession. This injunction was granted without security. (Code Civ. Pro. § 1703; *Newell v. Muzlow*, 115 N. Y. 171.) If the defendant has lawful right to the possession of the property he may, and should, set up his claim of right by answer. (*Newton v. Waller*, 12 Wkly. Dig. 314; *Morris v. De Witt*, 5 Wend. 71.)

John Cunneen for respondent. The controversy between Read and the Rockwells, or their estates, as to the ownership of the certificates, cannot be tried without the presence of the representatives of the estate of the Rockwell decedents. (*Read v. M. Bank*, 49 N. Y. S. R. 678.) The action should not proceed without the presence of the representatives of those estates. (*Osterhoudt v. Bd. of Suprs.*, 98 N. Y. 249.) A person sued for the recovery of a chattel by one of different persons claiming the right to such possessions, may have such other claimant substituted as defendant in his stead. (Code Civ. Pro. § 820.)

ANDREWS, Ch. J. The order from which this appeal is taken perpetually enjoined the plaintiff from further prosecuting the

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action. The action was replevin to recover the possession of two certificates of deposit issued to the plaintiff by the Marine Bank of Buffalo, payable to his order, one in 1881, and one in 1883. The defendant is the clerk of Erie county, and after the commencement of the action, and before the execution by the sheriff of the requisition requiring him to replevy the certificates, further proceedings were stayed on his application until the executors or representatives of Elizabeth and George Rockwell were brought in as parties defendant. The plaintiff appealed from the order of the Special Term to the General Term, and the order was affirmed by that court, with a modification, however, by which the stay was made absolute. The General Term proceeded on the ground that the certificates were held by the defendant as the officer of the court, and that the commencement of an action to replevy them, against the defendant, without the leave of the court, which had not been obtained, was a contempt of its authority. We think the orders of the Special and General Terms were erroneous and that a stay of the plaintiff's proceedings, either conditional or absolute, was unauthorized.

It must be assumed on this appeal that the certificates were the property of the plaintiff. They are unindorsed, and the title of the plaintiff is asserted in the affidavit in the replevin proceedings. It is admitted that they are in the custody of the defendant and that he refused to deliver them to the plaintiff. The action of replevin was, therefore, brought against him, and it was no defense that he was in possession as agent of another, who had no right to possession as against the true owner. The owner of a chattel may in general replevy from any person who has it in possession and who has no right to retain it as against him. (*Hall v. White*, 106 Mass. 599; *Leighton v. Harwood*, 111 id. 67; *Rose v. Cash*, 58 Ind. 278; *Herzberg v. Lasher*, 6 Mo. 483.) The plaintiff prior to the commencement of this action brought an action against the Marine Bank to recover the deposits represented by the certificates. The bank, among other defenses, alleged that the certificates were in the possession of George Rockwell

as part of the assets of the estate of his deceased wife, the sister of the plaintiff, and that the moneys deposited belonged to her and were deposited by the plaintiff as her agent. On the trial of that action the certificates were produced by George Rockwell under a subpoena *duces*, and were put in evidence by the plaintiff. The court directed a verdict for the plaintiff on the certificates, and at the same time, on its own motion, directed that the certificates be deposited with the clerk of the court and that the clerk should indorse thereon the fact that they were in judgment against the Marine Bank, and he was further directed to seal them up and retain them until the further order of the court. The direction was obeyed, and on the expiration of the term of office of the then clerk, the certificates were by him delivered to the defendant in this action, his successor in office, who held them under this delivery at the commencement of this action. The judgment in favor of the plaintiff in the suit against the Marine Bank was reversed in this court (136 N. Y. 154) on the ground that the plaintiff was not in a position to surrender the certificates at the time of the trial, and was not, therefore, entitled to recover. The new trial in the bank case has not yet been had, and this action was brought presumably to enable the plaintiff, if he shall establish his title to the certificates, to place himself in a position on the trial of the bank action, to meet the conditions upon which his right to recover against the bank depends.

We know of no principle which entitled the court, under the circumstances disclosed, to impound the certificates and place them beyond the reach of the writ of replevin, at the suit of the true owner. The purpose of the court in directing the detention seems to have been the protection of the bank which issued them, pending any further litigation as to the validity of the judgment. The reversal of the judgment rendered any further control of the certificates by the court or its officer unnecessary for the purpose indicated. The direction of the trial judge, that the certificates should be retained by the clerk until the further order of the court, was a summary

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assumption of authority, and clothed the clerk with no immunity from liability to respond in an action by the true owner to recover the certificates. The principle that where the court has, in the administration of justice, gained possession through its receiver or other officer, of the property in litigation, it is deemed to be in the custody of the law, and that this custody cannot be disturbed without permission of the court, has here no appropriate application. The principle applies only where there is a lawful possession under a lawful order of the court, and even in cases where property is in the hands of the receiver lawfully appointed, the courts are very cautious not to embarrass persons claiming title hostile to the receiver from pursuing the usual legal remedies for the enforcement of their rights. A receiver is not protected under a general order appointing him receiver of the property of a bankrupt or other person against replevin or other common-law action brought by a third person, claiming paramount title to property in his possession as receiver. (*Corn Exchange Bank v. Blye*, 101 N. Y. 303.) So, also, while the property of a judgment debtor taken on execution may be in the custody of the law, so as to prevent any interference by him with the possession of the officer, it may be replevied by a third person claiming superior title. (*Clark v. Skinner*, 20 Jo. 468.) Even where the property is in the custody of the law it is matter of course for the court, on application made in good faith, to permit suit to be brought by a third person claiming rights therein, which cannot be fairly adjudicated in the original action or proceeding, and in such case, if the action has been brought without such prior permission, the court will, if the conduct of the plaintiff has not been willful, permit the action to proceed. (*Hills v. Parker*, 111 Mass. 508.) The direction of the court made on the trial of the *Marine Bank* case, committing the certificates to the custody of the then clerk, was not made in the course of any contest between the rival claimants of the certificates. The question of title was not being tried as between them. It was involved in the issue made between the plaintiff and the bank. The estate of the plaintiff's sister

was not bound by any adjudication of title made in that action. Her husband brought the certificates into court under compulsion of a subpoena. He could not lawfully be deprived of the possession of the certificates by a summary order of the judge. The order as against him was a nullity, and it was a nullity also so far as it tended to deprive the plaintiff of his right to bring an action in replevin against the clerk or any other person in possession of the certificates. When the judgment of the Marine Bank was rendered, the whole purpose of the order was spent. We think the plaintiff was not bound, as a preliminary to his bringing his action against the clerk, to apply for leave to the court. Such an application could not have been justly denied, if leave was necessary, and even in that case it would be a harsh exercise of authority which visits the plaintiff with the penalty of an absolute stay of his proceedings in the action, for the technical omission to ask the leave of the court to bring it, which could not properly have been refused if application had been made.

The plaintiff was not bound to procure the appointment of representatives of the estates of Mrs. Rockwell and her husband and to apply to have them brought in as defendants. The Code gives a remedy where a third person makes a claim to the property involved in a replevin action (Code, §§ 1709 and 1710), and whatever might be done in procuring a substitution of the real claimant of a hostile title to that of the plaintiff, as defendant in place of the original defendant, must be done by the defendant. That burden he cannot impose on the plaintiff. The clerk may be put to trouble and expense in defending the action, without any fault of his own, but he stands as any other custodian of property who has assumed and strives to retain the custody as against the true owner, without lawful authority.

The orders of the Special and General Terms should be reversed, with costs.

All concur.

Orders reversed.

**MICHAEL BOWEN, Respondent, v. MICHAEL SWEENEY et al.,
Impleaded, etc., Appellants.**

In an action for partition it was ordered that the issues of fact be tried at Circuit, and certain questions were framed to be answered by the jury. Trial was so had, the questions were answered by the jury, and upon written consent of all parties it was directed that the further hearing of the action should be before the court at Special Term. Upon such hearing, the court made findings and conclusions of law incorporating in the former the findings of the jury, and an interlocutory judgment was entered thereon. *Held*, that a motion for a new trial at General Term was properly dismissed; that the issues in the action were triable by a jury as matter of right (Code Civ. Pro. § 1544); that the facts found by the jury were binding upon the Special Term; and so, the trial was not by the court without a jury, within the meaning of the Code of Civil Procedure (§ 1001) authorizing a motion for a new trial after entry of an interlocutory judgment, where the decision "upon trial of an issue of fact by the court" directs such a judgment.

(Argued October 8, 1894; decided October 16, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made June 14, 1894, which dismissed a motion by defendants for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

William H. Arnoux and *Francis C. Devlin* for appellants. An order of the General Term dismissing a motion for want of jurisdiction involves a substantial right, and is, therefore, appealable to the Court of Appeals. (*Tilton v. Beecher*, 59 N. Y. 176; *Hewlett v. Wood*, 67 id. 394; *Jemison v. C. S. Bank*, 85 id. 546; *Reed v. Mayor, etc.*, 97 id. 620; *Anderson v. Anderson*, 112 id. 104; *Borge v. B. Iron Co.*, 133 id. 477.) The motion for a new trial was properly made in this action at the General Term, and its refusal to hear the same under section 1001 of the Code was error. (*Vermilyea v. Palmer*, 52 N. Y. 471; *Learned v. Tillotson*, 97 id. 3; *Hammond v. Morgan*, 101 id. 86; *Acker v. Leland*, 109 id. 5;

Code Civ. Pro. §§ 963, 967, 999, 1000, 1002, 1201; *Raynor v. Raynor*, 94 N. Y. 248; *Tilton v. Vail*, 117 id. 520.)

Flamen B. Candler for respondent. The General Term committed no error in dismissing the motion for a new trial made there on the ground that it did not have jurisdiction to entertain the same. (Code Civ. Pro. §§ 1001, 1544; *Jones v. Jones*, 120 N. Y. 589; *Dorchester v. Dorchester*, 121 id. 156; *Knowlton v. Atkins*, 134 id. 313-322; *Tilton v. Vail*, 117 id. 520; *Garczynski v. Russell*, 75 Hun, 512.) Should the court, however, determine that error was committed by the General Term in refusing to entertain the motion for a new trial, then the disposition to be made of the present appeal would be to reverse the order and send the case back to the General Term for consideration. (*Dorchester v. Dorchester*, 121 N. Y. 156; *Reed v. Mayor*, 97 id. 620; *Hewlett v. Wood*, 67 id. 394; *H. F. Ins. Co. v. Tomlinson*, 58 id. 215.)

BARTLETT, J. This is an appeal from an order of the General Term of the first department dismissing appellants' motion for a new trial. This is an action for partition, and it was ordered that the issues of fact be sent to the Circuit, and certain questions were framed for the jury to answer. Trial was had, and the jury answered the questions propounded. Upon the written consent of all the parties it was directed that the further hearing of the action be proceeded with before the court at Special Term. Thereupon the action came on for further hearing at Special Term; the court made findings of fact and conclusions of law, including in the former the findings of the jury, and an interlocutory judgment was entered thereon. The appellants then moved at General Term, upon the pleadings, verdict, findings and other papers and proceedings, for a new trial. The General Term dismissed the motion upon the ground that the court had no jurisdiction to entertain the same.

The sole question presented in this appeal is whether the appellants were entitled to make the motion under section 1001 of the Code of Civil Procedure.

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The material portion of the section reads as follows: "Where the decision or report rendered upon the trial of an issue of fact by the court without a jury, or by a referee, directs an interlocutory judgment to be entered; and further proceedings must be taken before the court, or a judge thereof, or a referee, before a final judgment can be entered; a motion for a new trial upon one or more exceptions may be made at the General Term after the entry of the interlocutory judgment, and before the commencement of the hearing directed therein. * * *"

Does this record disclose the trial of an issue of fact by the court without a jury? This being an action for partition the issues were triable by a jury as matter of right. (Code, § 1544.) In an ordinary equitable action, where the issues are not triable by a jury, the court may, upon its own motion, direct one or more questions of fact to be tried at the Circuit, but it can disregard the findings of the jury, and proceed with the cause as if its aid had not been invoked. (*Acker v. Leland*, 109 N. Y. 11.)

In the case at bar the court was vested with no such discretion, and the facts found by the jury were binding upon the Special Term. (*Jones v. Jones*, 120 N. Y. 599.)

We are of opinion that the trial in this case was not by the court without a jury, within the meaning of section 1001 of the Code of Civil Procedure, and that the order appealed from is right and should be affirmed.

The order should be affirmed, with costs.

All concur.

Order affirmed.

JOHN S. CRONIN, Appellant, v. JOHANNA C. CROOKS,
Respondent.

A warrant of attachment recited that defendant "has assigned and disposed of, or is about to assign or dispose of," with intent to defraud her creditors. *Held*, that this was not a compliance with the provision of the Code of Civil Procedure (§ 641) which requires the warrant to "briefly recite the ground of the attachment;" that the warrant stated no ground, as to state in the alternative was to state neither the one fact nor the other; and so, it was fatally defective.

(Argued October 8, 1894; decided October 16, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made February 13, 1894, which affirmed an order of Special Term vacating a warrant of attachment.

The facts, so far as material, are stated in the opinion.

J. K. Long for appellant. The order of affirmance of the General Term is appealable. (*Birge v. B. B. Co.*, 133 N. Y. 477; *Anderson v. Anderson*, 112 id. 104; *Harbler v. Bernharth*, 115 id. 459; *Dintruff v. Tuthill*, 62 Hun, 594; *Johnson v. Buckel*, 65 id. 602; *Hale v. Prote*, 75 id. 13.) The learned General Terms in their construction of section 641 of the Code of Civil Procedure give too much prominence to that section, which is mainly, if not wholly, directory, and fail to construe it as they should do, with section 636, which clearly shows the affidavit is the whole foundation of the attachment, and if that shows facts bringing it within section 636 the warrant issues as a matter of course. (*Thompson v. Dater*, 57 Hun, 319; *Ross v. Wigg*, 34 id. 196; *N. P. Bank v. Whitmore*, 104 N. Y. 305; *Brinkley v. Brinkley*, 56 id. 193; *D. C. M. Ins. Co. v. Van Wagner*, 132 id. 401; Code Civ. Pro. § 649; *Folmsbee v. City of Amsterdam*, 142 N. Y. 122.) The warrant of attachment briefly and truly recited the grounds of the attachment as set up in the affidavit. Under the 2d subdivision of section 636 of the Code, what the affidavit must show is, the intent on the part of

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the defendant to defraud her creditors. (*Thompson v. Dater*, 57 Hun, 319; *Van Alstyne v. Ervine*, 111 N. Y. 331; *Garrison v. Brumberg*, 75 Hun, 336.) We think the true meaning of section 641 of the Code of Civil Procedure is that the warrant must show whether the defendant is one of the several classes of defendants against whom an attachment may issue. (*Van Alstyne v. Ervine*, 11 N. Y. 331.) The order vacating the warrant of attachment should have been reversed, because it is itself irregular and without jurisdiction in ordering the delivery of the attached property to James M. Walsh, not a party to the action, and in whose favor no claim or proof was made that he acquired any lien on the property after it was attached. (Code Civ. Pro. §§ 682, 709; *Delmore v. Owen*, 44 Hun, 296.)

Frank S. Black for respondent. The warrant is defective. (*Arnot v. Wright*, 55 Hun, 561.) There was a waiver of notice of motion. (*White v. Colton*, 59 N. Y. 629; *Thayer v. Marsh*, 75 id. 640.) It was not necessary to specify the ground of the motion in the notice. (Code Civ. Pro. § 641; *Winnebrenner v. Edgerton*, 30 Barb. 185.) The warrant could not be awarded. (Code Civ. Pro. § 723.) The affidavit was insufficient. (*Simar v. Canaday*, 53 N. Y. 298; *O'Reilly v. Freel*, 37 How. Pr. 272, 274; *Yates v. North*, 44 N. Y. 271, 274; *Ellison v. Bernstein*, 60 id. 145, 148; *Dint-ruff v. Tuthill*, 43 N. Y. S. R. 704; *Kneeland on Attachments*, 368, 369, 370; *M. N. Bank v. Ward*, 35 Hun, 395, 398; *Bennett v. Edwards*, 27 id. 352, 353; *Neil v. Sachs*, 15 Wkly. Dig. 476, 477; *S. C. Bank v. Alberger*, 78 N. Y. 252, 258; *Murphy v. Jack*, 142 id. 215; 1 Rumsey's Pr. 519; *W. Bank v. Meehan*, 49 N. Y. S. R. 606.)

GRAY, J. The warrant of attachment, which was granted in this action, was based upon an affidavit which set forth a certain disposition made by the defendant of her property; which deponent alleged to have been fraudulent, and whereby she had assigned and disposed of her property with intent to defraud her creditors and to hinder etc. the plaintiff in the

collection of his demand against her. Without considering the sufficiency of the affidavit, we think it very clear that the warrant was defective. The warrant recited that the defendant "has assigned and disposed of, or is about to assign or dispose of her property." The provisions of section 641 of the Code of Civil Procedure were not complied with. They provide, among other things, that the warrant "must briefly recite the ground of the attachment." This warrant stated no ground; for to state in the alternative, is to state neither the one nor the other fact. Such an alternative statement of grounds results in a mutual exclusion.

The General Terms of the first and fifth departments have construed the section of the Code in the same way as has the General Term below (*Johnson v. Buckel*, 65 Hun, 601; *Hale v. Prote*, 75 id. 13; *Dinturff v. Tuthill*, 43 State Rep. 704), and we think the construction, which has been thus generally given, is right. Our review of this order is justified by the insertion in it of the grounds for the affirmance. A question of law only was raised, as to the power of the court to grant such a warrant.

The order should be affirmed, with costs.

All concur.

Order affirmed.

ELIZABETH A. GRAY, Respondent, v. JAMES C. GRAY,
Appellant.

The complaint in an action for divorce brought by the wife alleged that the parties were married in this state and that plaintiff resided here. The summons was served in this state and defendant appeared and answered. The answer, after denying the commission of the offenses charged in the complaint, as a separate defense alleged that both parties were, "at all the times mentioned in the complaint," residents of the state of Pennsylvania, and that the courts of this state had no jurisdiction. To this plaintiff demurred as upon its face insufficient. Upon the pleadings and other proof which warranted a finding that the parties, before the commencement of the action, had separated, and that plaintiff was then a resident of this state as defined by the Code of Civil Procedure (§ 1768), an order was granted directing the payment by plaintiff of sums speci-

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fied for counsel fee and alimony. *Held*, that the court had power to make the order; that even if the fact of residence in another state was to be deemed settled by the demurrer, the legal effect of the fact presented an issue of law which defendant had no absolute right to have decided upon a motion, and the court has power to compel defendant to furnish plaintiff with means to meet it in the usual way; but that no such effect could be given to the pleadings upon a motion like this, in such an action.

(Argued October 8, 1894; decided October 16, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made May 14, 1894, which affirmed an order of Special Term awarding alimony and counsel fees to the plaintiff.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles A. Boston for appellant. The order of the General Term is appealable to this court. (*Collins v. Collins*, 80 N. Y. 1.) The court was without jurisdiction to grant this order. (*Cutler v. Wright*, 22 N. Y. 471; *Lorillard v. Clyde*, 86 id. 384; *Allen v. Patterson*, 7 id. 476; *Prindle v. Caruthers*, 15 id. 425; *Angell v. Van Schaick*, 132 id. 187; Code Civ. Pro. § 831; *De Meli v. De Meli*, 120 N. Y. 485; *Ferrier v. Ferrier*, 4 Edw. 296; *Muller v. Earl*, 5 J. & S. 388; *Stanton v. Swain*, 10 Civ. Pro. Rep. 12; *Bostwick v. Menck*, 4 Daly, 68; *Tiffany v. Bowerman*, 2 Hun, 643; *Harrison v. Harrison*, 20 Ala. 629; *People v. Dawdell*, 25 Mich. 247; *Reed v. Reed*, 52 id. 117; *Conway v. Beazley*, 3 Hagg. Ecc. 639; *Hawey v. Farnie*, L. R. [6 P. D.] 35; L. R. [8 App. Cas.] 43; Stewart on Mar. & Div. §§ 201, 218, 221; *Leith v. Leith*, 39 N. H. 20; *Barber v. Root*, 10 Mass. 260; *Sewall v. Sewall*, 122 id. 156; *Reel v. Elder*, 62 Penn. St. 208; *Colvin v. Reed*, 55 id. 375; *Ditson v. Ditson*, 4 R. I. 87; *Pitt v. Pitt*, 4 MacQueen H. of L. 627; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Dickinson v. Dickinson*, 63 Hun, 516; *Peugnet v. Phelps*, 48 Barb. 566; *Chamberlain v. Chamberlain*, 63 Hun, 96; 2 Bishop on Mar., Div. & Sep. §§ 144, 183; Brown on Jurisdiction, § 77; Lloyd on Div. 35;

Cooley on Const. Law, § 230; *Hanover v. Turner*, 14 Mass. 224; *Sewall v. Sewall*, 122 id. 156; *Cheever v. Wilson*, 9 Wall. 108; *Strader v. Graham*, 10 How. Pr. 82; *Hoffman v. Hoffman*, 46 N. Y. 30; *People v. Baker*, 76 id. 78; *Hunt v. Hunt*, 72 id. 217; *Delafield v. Brady*, 108 id. 524; *L. S. R. R. Co. v. Roach*, 80 id. 339; *U. S. v. Saunders*, 120 U. S. 126; 22 Wall. 492; *Badeau v. U. S.*, 130 U. S. 439; *Plimpton v. Bigelow*, 93 N. Y. 592; *Coats v. Donnell*, 94 id. 178; *Vanderpoel v. Gorman*, 140 id. 563; *Douglass v. P. Ins. Co.*, 138 id. 209; *Kerr v. Kerr*, 41 id. 272.) The application of the general principles of equity demanded that alimony *pendente lite* and counsel fees should be refused. (*Collins v. Collins*, 71 N. Y. 269; 80 id. 1; *Maxwell v. Maxwell*, 28 Hun, 566; *Moller v. Moller*, 115 N. Y. 466; *Lyon v. Lyon*, 62 Barb. 138; *Monk v. Monk*, 7 Robt. 153; 2 Bishop on Mar., Div. & Sep. §§ 714, 715; 1 Greenl. on Ev. §§ 45, 96, 200; *Bokel v. Bokel*, 3 Edw. Ch. 376; *Kane v. Kane*, Id. 389.)

Frederick H. Man for respondent. The Supreme Court had jurisdiction of the action. (Code Civ. Pro. §§ 1756, 1780; *Robinson v. O. S. N. Co.*, 112 N. Y. 315; *Brinkley v. Brinkley*, 50 id. 184, 201.) The amounts of the alimony and counsel fee allowed were moderate and proper. (*De Llamosas v. De Llamosas*, 62 N. Y. 618.)

O'BRIEN, J. The plaintiff in this action seeks to obtain against her husband, the defendant, an absolute divorce on the ground of adultery. The court at Special Term made an order, which has been affirmed on appeal, directing the payment to the plaintiff by the defendant of the sum of \$250 counsel fee besides \$100 per month alimony for the maintenance of the plaintiff and the two children of the marriage, residing with her in this state, during the pendency of the action.

The only question presented by this appeal is whether the court had the power to make the order. It is alleged in the complaint that the parties were married in this state and that the plaintiff resides here; that the defendant since the mar-

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riage has committed various acts of adultery, with proper specifications as to time and place. Some of these acts are charged to have been committed within this state and others in the state of Pennsylvania. It is not claimed that the complaint is in any respect defective or insufficient. The defendant in his answer, after denying the commission of the offenses charged, states as a third and separate defense to the whole complaint that, at the times mentioned in the complaint, both of the parties were residents of the state of Pennsylvania, and that the courts of this state have no jurisdiction of the action. The language in which this defense is framed, referring as it does to *all the times mentioned in the complaint*, and the dates there mentioned being that of the marriage and of the commission of the several acts of adultery charged, renders the meaning somewhat obscure, but it was doubtless intended to include the residence of both parties at the time of the commencement of the action. The plaintiff has demurred to this separate defense upon the ground that upon its face it is insufficient in law. The defendant's counsel argues that the facts stated in the special defense with respect to the residence of the parties stand admitted upon the record. It appears from a statement in the order that the pleadings with other proofs were before the court upon the hearing of the motion for counsel fees and alimony. The petition and affidavits in support of the motion would warrant a finding by the court upon the motion that the parties had separated some time before the commencement of the action and that the plaintiff was then a resident of this state as defined by § 1768 of the Code, unless the admissions of the demurrer were conclusive. Section 1756 of the Code authorizes an action for divorce where the parties were married within this state. The general rule to be derived from principles of universal application is that the courts of this state have no power to adjudge the status of parties residing beyond its jurisdiction. It is not likely that this rule was changed or intended to be changed by the provisions of the Code. Without deciding the question we will assume for the purposes of this appeal that such

is the law. But it would not follow, we think, from such concession that the order in question was made without power. It appears from the papers used upon the application that the summons was served upon the defendant in this state and that he has appeared though denying the jurisdiction as above stated. The court thus obtained jurisdiction of the defendant's person though it may not of the subject-matter of the action. The defendant, upon his own theory, came into the courts of this state to obtain an adjudication as to the legal effect upon the action of the residence of the parties in another state at the time of the commencement of the action. He presented a question which the court was not bound to decide in advance of the trial and upon a motion of this character. The admissions of the demurrer and the allegations in the petition and affidavits were in conflict. The jurisdiction of the court to grant the plaintiff any relief was a fundamental question upon which the plaintiff was entitled to a hearing and to the assistance of counsel quite as much as upon any other question of fact or law in the case. If it be assumed that the defense as to the jurisdiction was good the defendant might have safely disregarded the action and challenge any judgment rendered against him as void when attempted to be enforced at any time or within any jurisdiction. But he elected to have a decision upon the question in the courts of this state, and he was not entitled to that except in the regular and ordinary course of procedure and upon compliance with the usual practice with respect to counsel fees and alimony. Even if the fact of residence in another state was to be deemed settled by the demurrer, still the legal effect of the fact upon the suit still remained. That raised an issue of law which the defendant had no absolute right to have decided upon a motion, as the court had power to compel him to furnish the plaintiff the necessary means to meet it in the usual way. But admissions made by the parties in an action to obtain a divorce, whether by pleading or otherwise, are not always binding upon the court or the parties themselves for all purposes and at every stage of the action. It is not until

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judgment is rendered upon the issue of law and all opportunity for the party demurring to change position by amendment or withdrawal has passed, that such a pleading upon a motion like this should be given the effect claimed for it by the learned counsel for the defendant. The papers used on this motion disclosed a condition of things that might well induce the court to hesitate before declining at that stage of the case to proceed for want of jurisdiction. The plaintiff's petition and the affidavits in support of it states in positive terms that she resided in Brooklyn with her mother when the action was commenced. The fact that she was actually sojourning or dwelling there at the time is nowhere denied by the numerous affidavits produced by the defendant. On the contrary, it is perfectly plain as matter of fact that the plaintiff left Philadelphia, where her husband then and still resides, in April, 1893, some months before this suit was commenced, and that since that date she has been residing within this state. The point and meaning of the answer demurred to is that inasmuch as the residence and domicile of the defendant is in Pennsylvania that also must be the residence and domicile of his wife. It is no doubt true that, *prima facie*, the domicile of the husband is that of the wife, but it is equally true that in cases where a separation takes place by reason of domestic difficulties, such as are disclosed by this record, the wife may obtain a residence in this state which will enable her to maintain the action. (Code, § 1768.) It appears that numerous papers were read upon the hearing of the motion upon the question of residence by both sides without objection, and under such circumstances the court was not confined to what appeared from the pleadings, but had the right to consider the other proofs and to do justice according to what seemed to be the actual facts of the case. Giving to all the proofs before the court their proper weight the power to make the order cannot, I think, be doubted.

It follows that the order should be affirmed, with costs.

All concur, except BARTLETT, J., not voting.

Order affirmed.

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| 148 | 860 |
| 148 | 498 |
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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
PASQUALE LEONARDI, Appellant.

Under the provision of the Penal Code (§ 22) declaring that "whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive or intent with which he committed the act," where it appears upon the trial of an indictment for murder in the first degree that the defendant was intoxicated when he committed the homicide, the jury should be instructed that if the intoxication had extended so far in its effects that the necessary intent, deliberation and premeditation were absent, the fact of intoxication must be considered, and a verdict rendered in accordance therewith. In such a case the intoxication need not be to the extent of depriving the accused of all power of volition or of all ability to form an intent.

Upon the trial of an indictment for murder it appeared that the homicide was committed by defendant without provocation and without motive, and that he was very much intoxicated at the time. The court charged in substance that if defendant had intelligence enough to know right from wrong, that the act he committed was wrong, he was responsible; but if he was bereft of reason, sense and judgment, and acted without knowledge or intent as to the result of his acts, he was irresponsible, and that this was all the court would say as to the intoxication of defendant bearing upon his capacity to distinguish between right and wrong, but that it would speak thereafter upon the subject of intoxication as bearing upon the question of motive. Subsequently the court charged that if defendant was sober enough to know what he was about, that the act was wrong, then his intoxication and motive would both exist, and the one would not destroy the other; that he must be so completely intoxicated in order to be excused as to be destitute of the capacity to realize the wrongful nature of the act, that his acts were wholly aimless and without purpose. *Held*, error.

(Argued October 9, 1894; decided October 23, 1894.)

APPEAL from judgment of the Court of Oyer and Terminer of Montgomery county, entered upon a verdict rendered November 23, 1893, which convicted the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

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Louis H. Reynolds for appellant. The learned trial justice, in his charge to the jury, erred in reference to the defendant's conduct at the time of the assault. (*People v. Rego*, 36 Hun, 132; Code Crim. Pro. § 420; *Chapman v. E. R. Co.*, 55 N. Y. 579; *People v. Kelly*, 35 Hun, 296.) The learned trial justice, in charging the jury, erred in his reference to the defendant's intoxication. (Penal Code, § 22; *People v. Fish*, 125 N. Y. 136.) The motion for a new trial should have been granted. (Code Crim. Pro. §§ 465, 528; Penal Code, § 22.)

Leonard F. Fish for respondent. The facts proven clearly established premeditation and deliberation. (*People v. Fish*, 125 N. Y. 136; *People v. Conroy*, 97 id. 62; *Leighton v. People*, 88 id. 117; *People v. Beckwith*, 103 id. 360; *People v. Pallister*, 51 N. Y. S. R. 723; *People v. Majone*, 91 N. Y. 211; *People v. Hawkins*, 109 id. 411; *People v. Kelly*, 22 N. Y. S. R. 969; *People v. Cignarale*, 110 N. Y. 23; *People v. Clark*, 7 id. 385; *People v. Sullivan*, Id. 400; *People v. Rodgers*, 19 Wend. 606; *Fitzgerald v. People*, 37 N. Y. 413; *McKee v. People*, 36 id. 113; *Willis v. People*, 32 id. 715; *Kenny v. People*, 31 id. 330.) The alleged intoxication is no defense. (*People v. Fish*, 125 N. Y. 136; *Willis v. People*, 32 id. 715; *Kenny v. People*, 31 id. 330; *People v. McLeod*, 1 Hill, 377; *People v. Flanigan*, 86 id. 554; *People v. Rodgers*, 18 id. 9; *Rex v. Meakim*, 7 C. & P. 297.) The motion to the trial court for a new trial was properly denied. (*People v. Davis*, 46 N. Y. S. R. 215; *People v. Noonan*, 38 id. 357; *People v. Leighton*, 1 N. Y. C. R. 469; *People v. Johnson*, 110 N. Y. 134; Code Crim. Pro. § 465, subd. 7.) It is unnecessary to prove motive. (*People v. Wezza*, 125 N. Y. 741; *People v. Fish*, Id. 146; *People v. Conroy*, 97 id. 75; *McKee v. People*, 36 id. 115.)

PECKHAM, J. The defendant appeals from the judgment of the Montgomery Oyer and Terminer entered upon the verdict of a jury convicting him of the crime of murder in the first degree. He was convicted of the killing of one Conover

by stabbing him with a knife. The defendant is an Italian about twenty-four years of age. On the afternoon of September 12, 1893, in one of the streets of Amsterdam, he met the deceased and inflicted upon him the wounds from which he died in the course of a few days. The killing was done publicly, in the presence of a number of people, and so far as the deceased was concerned it was wholly without provocation, and, as counsel contended, it was also without motive.

There was evidence upon the part of the defendant that he was very much intoxicated at the time, and the material question in this case arises over the charge of the judge as to the proper effect to be given to this fact. It would seem that the counsel for the defendant had maintained before the jury that defendant was substantially insane, and, therefore, irresponsible at the time he committed the deed, or if not insane that he was so far intoxicated as not to have been guilty of murder in the first degree.

Further elaboration of the facts preceding and surrounding the killing is unnecessary in order to appreciate the bearing of the remarks of the learned judge in his charge to the jury upon the question of intoxication.

The judge charged upon the defense of insanity that if the defendant had intelligence enough to know right from wrong as to the character of the act which he committed, knew that it was wrong, he was responsible; but if he were bereft of reason, intelligence, sense and judgment and acted without knowledge or intent as to the result of his acts he was an irresponsible person. No criticism can be passed upon this portion of the charge. The judge then said that that was all he should say as to the intoxication of the defendant bearing upon his knowledge of right and wrong, of his capacity to distinguish between right and wrong and to know whether the act of stabbing and killing Conover was wrong, but that he should speak thereafter upon the subject of intoxication as bearing upon the question of motive.

His charge thus far, it is seen, was confined to the question of drunkenness as an excuse, so far as to render the person

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irresponsible as an insane person, or as one who was so far intoxicated as to be wholly unaware of the act committed by him, or of its nature or extent. Then other matters were touched on by the learned judge, and subsequently he charged the jury with great ability and clearness upon the law in regard to the grade of the crime, the fact of premeditation and deliberation and the time necessary to elapse in order to constitute the higher grade of the crime of murder. All this was done with great fairness and in a manner which left nothing to be desired. He then continued his charge upon the fact of intoxication with regard to this portion of the case as follows :

“ Now, that is all I propose to say on that branch of the case except with respect to intoxication. Of course the defendant must, in order to be found guilty of murder in the first degree, or indeed of any degree of murder, have the intention to kill ; have some motive perhaps—the law does not, however, require that any motive shall be proved, and perhaps I ought to correct my statement by saying that it is proper for you to look into the testimony closely for the purpose of discovering a motive. It is not necessary that you should find it. It is alleged on the part of the defendant that the prisoner did not, in consequence of intoxication, have any motive ; that he did not have any such sufficient intention to kill as would constitute murder in the first degree, and that he was not capable of so deliberating as to be guilty of murder in the first degree. These are questions for you to consider upon all the evidence. I express no opinion with respect to it. It is not my province to express any opinion with reference to a question of that nature. It is a question of fact for you to determine, and I am only required to state the rules of law which you ought to have in your minds in reaching your determination. If he was sober enough to know what he was about, and that the act was wrong, then his ‘intoxication and his motive would both exist and the one would not destroy the other. If his intoxication made him more excitable and led him the more readily and easily to commit the

crime, to form the intent and to reach a conclusion, as the result of deliberation upon it, then his intoxication would not help him. He must be so completely intoxicated in order to be excused as to be destitute of the capacity to realize the wrongful nature of his act; that his acts are wholly aimless and without purpose. I might illustrate the idea which I have in mind and am trying to present to you by referring to the testimony in relation to (his brother) Pietro's acts upon the streets. As I before remarked, there does not seem to be much question but what Pietro was very much intoxicated. And among the other acts which are spoken of by witnesses as having been done by Pietro is the act of standing on the street and picking up stones and throwing them down again with violence. Now what motive could he have had for picking up stones and throwing them down on the street? That seems to me to be very much like an aimless, purposeless act of a man who does not know what he is about, who is doing something without any motive, and I speak of it to impress upon your minds, if I can, a correct notion of the extent of the intoxication under which a man must rest in order to make his acts purposeless acts. He must strike something like the wild beasts, bereft of sense, intelligence, judgment and reason, that act according to a purposeless impulse. You are to consider how well the evidence satisfies you that the defendant Pasquale had reached that aimless and purposeless condition."

At common law drunkenness was not only not an excuse for crime, but evidence of intoxication while admissible, and to be considered in some cases, was yet generally of no avail. If a man made himself voluntarily drunk it was no excuse for any crime he might commit while he was so, and he had to take the responsibility of his own voluntary act. If the assault were unprovoked, the fact of intoxication would not be allowed to affect the legal character of the crime. The fact of intoxication was not to be permitted to be even considered by the jury upon the question of premeditation. These principles are stated in many cases in this court. (*People v. Rogers*, 18 N. Y. 9; *Kenny v. People*, 31 id. 330; *Flanigan v. The People*, 86 id. 554.)

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The strict rule of the common law has, however, been slightly relaxed by our Penal Code, the twenty-second section of which reads as follows :

“ No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive or intent with which he committed the act.”

Under this section it has been held by this court that it is not proper to charge the jury that the mere fact of intoxication is necessarily evidence even tending to show an absence of premeditation and deliberation. Such fact, the court said, might tend in some cases to show absence, while in others it might not. We held that it was now simply the duty of the judge to leave it to the jury to take into consideration the question of intoxication determining the motive or intent of the accused, and whether he acted with deliberation and premeditation. (*People v. Mills*, 98 N. Y. 176.) We do not think that under this statute the intoxication need be to such an extent as to necessarily and actually preclude the defendant from forming an intent or from being actuated by a motive before the jury would have the right to regard it as having any legal effect upon the character of defendant's act. Any intoxication, the statute says, may be considered by the jury and the decision as to its effect rests with them. That a man may be even grossly intoxicated and yet be capable of forming an intent to kill or do any other criminal act is indisputable, and if, while so intoxicated, he forms an intent to kill and carries it out with premeditation and deliberation, he is without doubt guilty of murder in the first degree, and the jury should, when such a defense is interposed, be so instructed. It is a most important and far-reaching statute in its possible effects, and the jury ought to be warned that where the criminal act is fairly and clearly proved, the fact of intoxication as fur-

nishing evidence of the want of the criminal intent which the proof might otherwise show, should be considered by it with the greatest care, caution and circumspection, and such fact ought not to be allowed to alter the character or grade of the criminal act unless they have a fair and reasonable doubt of the existence of the necessary criminal purpose or intent after a consideration of such evidence of intoxication. The safety of society depends to a large extent upon the due administration of our criminal law, and the voluntary intoxication of an accused person should be most cautiously considered before arriving at a conclusion that it has in any way altered the character or grade of a criminal act. It ought always to be borne in mind that by the terms of the very statute cited no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. In other words, it should still be remembered that voluntary drunkenness is never an excuse for crime. In *People v. Fish* (125 N. Y. 136) it was held that under this section of the Penal Code, if the accused be sober enough to and do form an intent and so deliberate upon and premeditate the crime, then he is responsible the same as if he had been perfectly sober, and that he is guilty even though intoxicated. By our statute deliberation and premeditation are necessary constituents of the crime of murder in the first degree, and if by reason of intoxication the jury should be of opinion that the deliberation or premeditation necessary to constitute murder in the first degree did not exist, the crime is reduced to a lower grade of murder, or in the absence of any intent to kill, then to manslaughter in some of its grades. The intoxication need not be to the extent of depriving the accused of all power of volition or of all ability to form an intent. The jury should be instructed that if the intoxication had extended so far in its effects that the necessary intent, deliberation and premeditation were absent, the fact of such intoxication must be considered and a verdict rendered in accordance therewith. In the portion of the charge of the learned judge which has been

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above set forth we fear that he required evidence of the existence of too great a degree of intoxication before the jury were permitted to find the absence of the necessary intent or degree of deliberation or premeditation. I have endeavored to state what the rule is in such cases.

There was no exception taken to the charge of the judge, and under the old system the defendant would be without remedy here, although we might feel convinced that the judge had erred in a material portion of the charge. But the statute now provides for a direct review by this court of a judgment upon a verdict of conviction of murder in the first degree. Where justice demands it we can grant a new trial although no exception appears in the case. Errors, however, even of a material nature, if unexcepted to upon the trial, are not necessarily ground for granting a new trial by this court. In the absence of exceptions, unless the record shows that the ends of justice really require a new trial, it will not be granted, even though some legal or material error may have occurred upon the trial. These principles are decided in several cases. (*People v. Driscoll*, 107 N. Y. 414; *People v. Lyons*, 110 id. 618; *People v. Kelly*, 113 id. 647.)

In this case the error in the charge was of the most vital nature, and although possibly it may be open to the claim that it was given with reference to the question as to what amount of intoxication formed an excuse to the defendant, yet we are fearful that the jury may have been misled and may have thought that the language appertained to the subject of considering the extent of the intoxication of the defendant with reference to the intent with which he struck the blows.

Taking all the facts and circumstances of the case into consideration as they appear in this record, we think the demands of justice will be best subserved by giving the defendant the benefit of a new trial.

The judgment must, therefore, be reversed and a new trial granted.

All concur.

Judgment reversed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
BENJAMIN S. VAN ZILE, Appellant.

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| 143 | 368 |
| 173 | *132 |

Suspicion cannot give probative force to testimony in a criminal action which is, in itself, insufficient to establish or justify an inference of a particular fact, and proof of one offense cannot aid in establishing another, which other is not only not proved, but as to which there is no affirmative evidence from which a legal inference of its commission can be drawn.

An indictment for abortion contained two counts—one charging the commission of the offense by the use of instruments—the other by administering a medicine or drug. The only evidence under the first count, so far as defendant was concerned, was his own testimony, which was to the effect that at a time specified he made an examination to determine whether the woman was pregnant, and after he had stated what occurred, which, if true, showed that no criminal operation was performed, he denied the use of any instrument which would have that effect. Defendant's counsel requested the court to charge that there was no evidence as to what occurred at the time stated, except defendant's testimony, and this utterly disproved that any criminal operation was performed or attempted at that time. The court refused to charge other than that there was no direct evidence of what took place, except that of defendant, and as to that the jury were not compelled to accept all of it, but might believe such as they credited and reject such as they discredited. Said counsel then requested the court to charge that there was "no evidence to justify a finding that any criminal operation was performed or attempted" by defendant on that occasion. This the court refused. *Held*, error.

Evidence was given on the part of the prosecution tending to support the second count in the indictment. The case was submitted on both counts and a general verdict of guilty rendered. *Held*, that this did not render the error harmless, as defendant may have been prejudiced in respect to the charge in the second count by the ruling.

(Submitted October 10, 1894; decided October 23, 1894.)

APPEAL from judgment of the Court of Oyer and Terminer of Kings county, entered upon a verdict rendered February 10, 1893, which convicted the defendant of the crime of abortion.

The facts, so far as material, are stated in the opinion.

James & Thomas H. Troy for appellant. The opening statements of the district attorney that "Van Zile was jointly

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Statement of case.

indicted with Terrell," "that there was but one count in the indictment against both of them, which was that the abortion was committed by mechanical appliances," "that on the trial it was disclosed that the defendant, Benjamin S. Van Zile, the physician, had given a prescription that was to aid and accelerate and bring about this abortion, and that being so we had to re-indict Van Zile," were entirely erroneous. They must have been prejudicial to the defendant, but the mere possibility that they were so is sufficient in a case involving personal liberty to reverse the conviction. (*Williams v. B. C. R. Co.*, 126 N. Y. 96; *Koelges v. G. Ins. Co.*, 57 id. 638; *Walsh v. People*, 88 id. 458; *People v. Hettick*, 1 Wheeler's Crim. Cas. 399; *Ins. Co. v. Cheever*, 36 Ohio St. 201; *Rolfe v. Rumford*, 66 Maine, 564; *Dickinson v. Burke*, 25 Ga. 225; *Mitchum v. State*, 11 id. 616; *Tucker v. Keinneker*, 41 N. H. 317.) Permitting the prosecution at the close of the case to give proof for the purpose of showing instruments had been used was erroneous and the exception was properly taken. (*Beebe v. People*, 5 Hill, 32; *People v. Garcia*, 25 Cal. 531; 1 Greenl. on Ev. [14th ed.] §§ 186, 205.) The statement of the learned court that Terrell had been convicted, effectually disposed of any possibility of Van Zile's acquittal. For this most vital and injurious error, if for no other, the conviction should be reversed. (Penal Code, § 527; *Wheeler v. Sweet*, 137 N. Y. 435.)

James W. Ridgway and *John F. Clark* for respondent. The verdict should be sustained if any count in the indictment is good and there is any evidence to support it. (*People v. Phelps*, 72 N. Y. 365; *People v. Gonzales*, 35 id. 100; *Real v. People*, 42 id. 270; *Hope v. People*, 83 id. 424; *People v. Wiley*, 3 Hill, 194; *Kane v. People*, 8 Wend. 210; *People v. Gilkkinsar*, 4 Park. Cr. Rep. 26-29; *People v. Strin*, 1 id. 202; *Barreu v. People*, Id. 246; *Fraser v. People*, 54 Barb. 306; *People v. Herrick*, 13 Wend. 91; *Bieshofsky v. People*, 3 Hun, 40; *Lyons v. People*, 68 Ill.

272.) It was the duty of the court, under the circumstances, to state the reason why the defense did not call Terrell. (*People v. McCarty*, 110 N. Y. 316; *Price v. Brown*, 98 id. 388.)

ANDREWS, Ch. J. The defendant was indicted for the crime of abortion as defined by sec. 294 of the Penal Code. The indictment contains two counts. The first charges the use of the instruments by the defendant upon the body of one Lillie M. Cook, with intent to produce a miscarriage, and he is charged in the second count with prescribing and causing to be administered to her a certain medicine, drug or substance, with the same intent. The case was submitted to the jury under both counts, who rendered a general verdict of guilty. The court in its charge instructed the jury in substance that if they should find that the defendant either used an instrument for the purpose and with the intent charged, or prescribed for, or gave drugs to the person named, with the same intent, he could be convicted. The counsel for the defendant on the conclusion of the charge asked the judge to charge certain propositions which he had submitted, among others that "there was no evidence before the jury of what transpired in Dr. Van Zile's house on the 8th day of November, 1889, except what is furnished by the testimony of Dr. Van Zile himself, and that so far as that testimony is concerned, he utterly disproved that any criminal operation was performed or attempted at that time." The judge declined to charge other than as follows: "There is no direct evidence of what took place there except his statement. That is the only direct evidence of what occurred and as to that you (the jury) are not compelled to accept all of his statement. You may believe such as commands credit at your hands and reject such as you discredit." The defendant's counsel excepted to the refusal of the judge to charge as requested and to what he charged on that point. The counsel further requested the judge to charge that "there is no evidence to justify a finding that any criminal operation was performed or attempted by

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Van Zile on that occasion." This request was also refused and an exception was taken.

We think the requests to charge were improperly refused, for the reason that there was no evidence which justified a submission to the jury of the guilt of the defendant under the first count in the indictment, charging the use of instruments to produce a miscarriage. For the proper understanding of this point, a brief reference to the circumstances shown is necessary. So far as appears, the first connection of Dr. Van Zile with the case was an application made to him on or about the 8th day of November, 1889, by a young man named Terrell, who stated to the defendant in substance that it was thought he had a young woman in trouble, but he did not believe it, and he then asked the defendant if he would make an examination to ascertain the fact, and how much the defendant would charge for making it. The defendant said he would make the examination, and that his charge would be \$25. The young man Terrell, in company with a young woman, who was a saleswoman in a store, went to the defendant's office on the evening of Nov. 8th, 1889. The only evidence of what there occurred is contained in the testimony of the defendant. Terrell was in prison and was not examined on the trial, and the girl was dead, she having died at her mother's house on the 25th of December thereafter. Van Zile testified in substance that on that occasion he examined the girl for the purpose of ascertaining whether she was pregnant; that he used a speculum and sponged the parts with a soft sponge to aid him in making his observations, but not disturbing the cervix of the womb, or doing anything tending to produce an abortion; that a few minutes only were occupied in the examination; that he ascertained that the girl had advanced a month or two in her pregnancy, and so told Terrell, and advised him to marry her. This was all the evidence of what occurred on that occasion. It appeared from the examination of medical witnesses that an instrument called a tent sponge is sometimes used to produce a miscarriage, which, being introduced into the opening or neck of the

womb, will gradually absorb the substance which collects there in case of pregnancy, operating as a barrier against premature delivery. But there is no evidence that the defendant had or used a tent sponge, and he positively testified that he did not use one on that occasion, but only a soft sponge for the purpose of washing the parts. The evidence of this transaction, as given by the defendant, the only witness who spoke upon the subject, did not tend to sustain the charge of using instruments to produce an abortion.

The judge correctly stated that the jury could believe or disbelieve the defendant's narration, or believe part and reject the rest. But if the whole had been rejected there would have been no evidence whatever of what was done on the evening in question or even that any examination was made. If the entire evidence is credited it shows no criminal act, and if part only was believed, the same result follows, because the statements, neither separately nor together, show or tend to show a violation of the statute. The jury had no right upon mere conjecture to assume or find that the defendant had withheld something, or that he used instruments not shown to have been used, or that he falsely denied such use. Nor was there any proof of injury to the person of the girl disclosed on the autopsy, which would justify an inference that force had been used on this occasion. On the contrary, the great preponderance of evidence is that in case of the use of instruments miscarriage results within a short time thereafter.

Evidence was given tending to support the second count in the indictment, charging the prescription by the defendant of drugs for the purpose and with the intent charged. This was denied by the defendant on oath. The claim on the part of the prosecution was, that on or about the 11th of November, the defendant, at the request of Terrell, prescribed and had put up an abortive compound to be used by the girl. The coupling of the latter evidence with the former may give rise to grave suspicion that the defendant did not state the whole truth as to the transaction on the evening of November 8th. But suspicion cannot give probative force to testimony which

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in itself is insufficient to establish, or to justify an inference of a particular fact, and proof of one offense cannot aid in establishing another, which other is not only not proved, but as to which there is no affirmative evidence from which a legal inference can be drawn.

It is claimed, on the part of the People, that the jury having found the defendant guilty on both counts, and there being legal proof to sustain the conviction on the second count, charging the prescription of drugs, the evidence submitting the question of the use of instruments was harmless. This claim cannot be supported. It does not follow that the defendant was not prejudiced in respect of the charge of prescribing drugs by the ruling of the court that there was evidence to sustain the charge of the use of instruments for the same purpose. The evidence as to one specification might be regarded by the jury as having additional weight, because of the ruling that there was competent evidence to sustain the other. The principle that where there are several counts, some of which are good, each founded upon the same transaction, but varying in some detail to meet the proof which may be offered, and there is a general verdict of guilty on all the counts, the conviction will not be reversed because of a defective count, has been frequently declared. (See *Real v. People*, 42 N. Y. 270; *Phelps v. People*, 72 id. 365.) But this principle has no application here. There was no defective count. The offense was properly charged in both counts. The means charged in the counts were distinct. Whether they could have been properly charged in one count need not be considered. But if there was no evidence that one of the means charged had been used, the defendant was entitled to have the jury so instructed.

The judgment should be reversed and a new trial ordered.
All concur.

Judgment reversed.

148 874
149 584

FRANCIS H. WEEKS et al., as Executors, etc., Respondents, v.
FREDERIC B. ESLER, Appellant.

It seems, that the mere presence of a corporate seal upon an instrument in the form of a promissory note, executed by the corporation without any evidence that its officers intended to or did affix it, does not change the character of the instrument.

Upon the corner of such an instrument was impressed the name of the corporation, with the words "Incorporated. Seal." There was no recital that the seal of the corporation was affixed, and in an action against the payee as indorser of the instrument, there was no evidence that the corporate seal was impressed, or that what thus appeared was the corporate seal. *Held*, that the paper could not be regarded as a sealed instrument.

As to whether the presence upon such an instrument of the corporate seal would affect its negotiability, *quære*.

Reported below, 68 Hun, 518.

(Argued October 11, 1894; decided October 23, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 14, 1893, which affirmed a judgment in favor of plaintiffs entered upon a verdict directed by the court.

This action was brought against defendant, as indorsee of two instruments in the form of promissory notes, made by the Electric Power Company, payable to the order of defendant, who indorsed them to the United Electric Traction Company, by whom they were indorsed and delivered for value before maturity to plaintiff's testatrix.

The notes were signed by the president and treasurer, and upon the lower left-hand corner of each was impressed the following:

THE ELECTRIC POWER
COMPANY.
INCORPORATED
SEAL 1889.

The defendant set up on his answer that the notes were sealed and so non-negotiable.

Further facts appear in the opinion.

William H. Rand, Jr., for appellant. An instrument in form a promissory note but under seal is not negotiable. (*Chitty on Bills*, 516, 517; *Butler v. Crisps*, 6 Mod. 29; *Pearson v. Garrett*, 4 id. 242; *Lamourieux v. Hewitt*, 5 Wend. 308; *Warren v. Lynch*, 5 Johns. 239; *Steele v. O. C. M. Co.*, 15 Wend. 266; *Merritt v. Cole*, 9 Hun, 98; *Curtis v. Leavitt*, 15 N. Y. 9; *Mann v. Sutton*, 4 Rand, 253; *Farce v. Craig*, 2 Halst. 272; *Parker v. Kennedy*, 1 Bay, 398; *Parks v. Duke*, 2 McCord, 380; *Tucker v. English*, 2 Speers, 673; *Lewis v. Wilson*, 5 Blackf. 369; *Sayre v. Lucas*, 2 Stew. 259; *Skidmore v. Tuttle*, 4 Tex. 301; *Dinsmore v. Duncan*, 57 N. Y. 573, 577; *Brown v. Jordhal*, 32 Minn. 135; *Bradford v. Randall*, 5 Pick. 496; *M. D. Foundry v. Hovey*, 21 id. 417; *Stebbins v. Merritt*, 10 Cush. 27; *Phillips v. Coffee*, 17 Ill. 154; *Morris v. Kell*, 20 Minn. 531, 533; *Koehler v. I. Co.*, 2 Black, 717; *D. Co. v. Myers*, 6 S. & R. 16; *S. L. Schools v. Risley*, 28 Mo. 415; *S. J. Church v. Steinmetz*, 18 Penn. St. 273; *Reynolds v. Trustees*, 6 Dana, 40; *S. C. Assn. v. Bustamente*, 52 Cal. 192; *Staples v. Nott*, 128 N. Y. 403; *Hopkins v. R. R. Co.*, 3 W. & S. 410; *Sidle v. Anderson*, 45 Penn. St. 464; *Erevall v. Fitch*, 5 Whart. 325; *Henricus v. Englert*, 137 N. Y. 488; *Briggs v. Partridge*, 64 id. 357; *Shuefer v. Henkel*, 75 id. 378; *Nicholl v. Banke*, 28 id. 580.)

George Holmes and De Forest Bros. for respondents. The notes are negotiable on their face under the law merchant. (*Weeks v. Esler*, 68 Hun, 519, 579; *Daniel on Neg. Inst.* § 32; *Clarke v. F. W., etc., Co.*, 15 Wend. 56; *Steele v. O. M. Co.*, Id. 265; *Porter v. McCullum*, 15 Ga. 528; *C. Bank v. C. R. R. Co.*, 5 S. C. 156; *Irwin v. Brown*, 2 Cranch, 314; *Spicer v. Buchannan*, Wright, 583; *Bank of St. Clairsville v. Smith*, 5 Ohio, 222; *Bain v. Wilson*, 10 Ohio St. 19; *Jackson v. Meyers*, 43 Md. 452; *Muth v. Dolfield*, Id. 466; *In re I. L. Co.*, L. R. [11 Eq.] 498; *Aggs v. Nicholson*, 1 H. & N. 165-225; *Colson v. Arnot*, 57 N. Y. 253.)

GRAY, J. The instruments sued upon were in the form of promissory notes of the Electric Power Company and were signed by "Frederic B. Esler President" and "F. A. Lee Treasurer." The defendant was the payee and they came into the hands of the plaintiffs' testatrix, for value. Upon the corner of each paper were impressed the words "The Electric Power Company. Incorporated. Seal. 1889," and it is argued that the presence of this seal deprived it of its negotiable character. We agree with the learned justices below that, in the absence of any recital that the seal of the corporation was affixed and of any evidence to show the fact of sealing, or that the corporate seal was impressed, or that it was, in fact, the corporate seal which thus appeared, these notes could not be regarded as sealed instruments. The absence of these elements precludes the presumption that they were uttered by the company as its sealed obligations. Assuming that the presence of the corporate seal upon such an instrument, or note, could affect its negotiability; — a proposition as to which we entertain grave doubts, but which we do not feel called upon now to determine — we think that its mere presence, unaccompanied by a single fact evidencing that the company's officers intended to, or did, affix it, was quite insufficient to have any effect upon its apparent character. These instruments have the appearance of having been made as the company's negotiable promissory notes, and we are not disposed to hold that the unexplained presence of a corporate seal upon them has made them anything else. We are unaware of any authority, and none has been brought to our attention, requiring us to hold otherwise. Whatever is claimed for the presumption which attaches ordinarily to seals of corporations, when appearing to be affixed to deeds or other instruments, in such a case as this it would be unreasonable to hold that any presumption existed.

The judgment appealed from should be affirmed, with costs. All concur.

Judgment affirmed.

MILES M. O'BRIEN et al., as Receivers, etc., Respondents, v.
LAWRENCE J. FITZGERALD, Impleaded, etc., Appellant.

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| 143 | 665 |
| 143 | 377 |
| 144 | 643 |
| 144 | 650 |

While the formal demand for relief with which a complaint concludes is not conclusive as to the character of the action, *i. e.*, whether legal or equitable, yet where the complaint sets forth facts that may support equally an action at law or equity, the character of the action is determined by the relief demanded.

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| 143 | 377 |
| 152 | 584 |
| 143 | 377 |
| 154 | 487 |
| 154 | 490 |

The complaint in an action brought by receivers of corporations alleged that each of the defendants had been a director of the corporation during a period stated. This showed that they had not all been directors for the same length of time or during the same period. The complaint then set forth various acts of negligence and wrong doing on the part of defendants, as directors, resulting in large losses to the corporation. A money judgment was asked against the defendants jointly for the full amount of loss claimed. There was no averment that an accounting was necessary to ascertain the damages, nor was it asserted that defendants were severally liable for separate and personal misconduct. On demurrer based upon the ground that different causes of action affecting different defendants had been improperly joined, *held*, that the action was to be regarded as one at law; and so, that the demurrer was well taken.

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| 143 | 377 |
| 168 | *201 |
| 168 | *211 |

Brinckerhoff v. Bostwick (105 N. Y. 567), distinguished.

(Argued October 8, 1894; decided October 23, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made July 16, 1894, which affirmed an interlocutory judgment in favor of plaintiffs, entered upon an order overruling a demurrer to the complaint.

This action was brought by plaintiffs as receivers of the Madison Square Bank. The complaint alleged, among other things, that seven of the defendants named were duly elected and qualified as directors of said bank and acted as such for the period between April 1, 1891, and August 9, 1893; that the other defendants were also duly elected and qualified and acted as directors for the periods specified as to each, to wit, one between April 1, 1891, and February 1, 1892, another

between February 1, 1892, and August 9, 1893, another between April 1, 1891, and May 24, 1893, another between April 1, 1891, and May 21, 1892, two others between February 6, 1893, and August 9, 1893. The complaint then set forth various acts of negligence and misconduct on the part of defendants as such directors and alleged that by reason thereof the bank, its creditors and stockholders, were damaged to the amount of \$750,000, for which sum judgment was demanded against "defendants and each of them."

The defendant Fitzgerald demurred to the complaint on the ground, among others, that two or more causes of action were improperly united.

Further facts are stated in the opinion.

Franklin Pierce for appellant. This is an action at law and not in equity. (*Smith v. Rathbun*, 66 Barb. 402; *Hun v. Cary*, 82 N. Y. 65; *Allen v. Curtis*, 26 Conn. 456; *Dodge v. Woolsey*, 18 How. [U. S.] 331; *Smith v. Hurd*, 12 Mete. 371; *Hirsh v. Barney*, 45 Fed. Rep. 137; *Howe v. Barney*, Id. 668; *Craig v. Greg*, 83 Penn. St. 19; *Evans v. Brandau*, 53 Tex. 56; *Faurie v. Millandau*, 3 Mart. [N. S.] 476; *Dias v. Brunell*, 24 Wend. 9; *Fowle v. Lowrason*, 5 Pet. 503; *Kieth v. R. R. Co.*, 8 Blatchf. 347; *Hodges v. N. E. S. Co.*, 1 R. I. 312; *E. S. T. & T. Co. v. Bickford*, 142 N. Y. 224; *C. Bank v. Ten Eyck*, 48 id. 305; *Holmes v. Wil-lard*, 125 id. 75; *Laverty v. Snethen*, 68 id. 524; *Van Dyck v. McQuade*, 86 id. 38, 45; 57 How. Pr. 62; *Whitney v. v. Martine*, 88 N. Y. 535; *F. Ins. Co. v. Jackson*, 3 Wend. 130; *Simmons v. V. O. & M. Co.*, 61 Penn. St. 202; *Warners v. Hopkins*, 11 id. 328; *O. & G. Co. v. Gibb*, L. R. [5 H. L.] 487; *Godbold v. B. Bank*, 11 Ala. 191; *L. R. R. Co. v. Bridges*, 7 B. Mon. 559; Angell & Ames on Corp. § 312; Thomp. on Neg. p. 1061; S. & R. on Neg. § 424; Morse on Banks & Banking (3d ed.) § 128; *B. M. I. Co. v. Cabbold*, 13 Moak's Eng. Rep. 556; *Farewell v. I. N. Bank*, 90 N. Y. 471; *Sands v. Birch*, 29 How. Pr. 308; *Brinkerhoff v. Bostwick*, 105 N. Y. 567, 571;

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Sherman v. Parish, 53 id. 483; *Sutherland v. Brush*, 7 Johns. Ch. 17; *Monnell v. Monnell*, 5 id. 283; *Banks v. Wilkes*, 3 Sandf. Ch. 99; *Adair v. Brimmer*, 74 N. Y. 539.) By the very terms of section 968 of the Code of Civil Procedure this action is a legal action and must be tried before a jury. (*Glenn v. Lancaster*, 109 N. Y. 642; *Fisher v. C. O. L. Ins. Co.*, 67 How. Pr. 191; *Bowery Bank v. Martin*, 16 N. Y. Supp. 73; *King v. Van Vleck*, 109 N. Y. 363; *Kennaugh v. McColgan*, 17 Civ. Pro. Rep. 287; *Penny v. Gillett*, 7 Wkly. Dig. 101; *Wood v. Simonson*, 12 N. Y. S. R. 512; Code Civ. Pro. §§ 1009, 1207; *Brinkerhoff v. Bostwick*, 99 N. Y. 185; *Mills v. Mills*, 115 id. 85; *Swart v. Boughton*, 33 Hun, 281, 285; *Vandenburg v. Mayor*, 7 N. Y. Super. Ct. 322.) Where plaintiffs have demanded a money judgment only and no answer has been served, but a demurrer has been interposed, the plaintiff cannot elect to treat his action as an action in equity. (*Edison v. Girvan*, 29 Hun, 422; *Fisher v. C. O. L. Ins. Co.*, 67 How. Pr. 191; *Simonson v. Blake*, 12 Abb. 331; *Alexander v. Katte*, 63 How. 262.) The cause of action set forth in the complaint is to recover for a tort, namely, the negligence of the defendants. It was a cause of action which was triable before a jury, and a jury only, at the time of the adoption of our first Constitution in 1777, and a jury trial was preserved by its provisions. The right to remedy such a wrong in a court of law and before a jury has existed from the very earliest times, and the defendants herein cannot be deprived of their right to a jury trial. (*Hudson v. Caryl*, 41 N. Y. 553; *Townsend v. Hendricks*, 40 How. Pr. 43, 162; *McMaster v. Booth*, 4 id. 427, 429; *Derrick v. Richley*, 19 Wend. 108; *Beardsley v. Dygert*, 3 Den. 380; *Bradley v. Aldrich*, 40 N. Y. 504; *Wheelock v. Lee*, 74 id. 495; *N. Y. L. Ins. Co. v. Mayor*, 106 id. 671; *Conderman v. Conderman*, 44 Hun, 181; *Verplanck v. Kendal*, 13 J. & S. 525.) If the action be at law the causes of action are improperly united. (*Jackson v. Brookins*, 5 Hun, 530; *Nichols v. Drew*, 94 N. Y. 22; *Chipman v. Palmer*, 77 id. 51.)

Louis Marshall for respondents. The complaint states facts sufficient to constitute a cause of action. (*L. Assn. v. Lyon*, 30 N. J. 732; *Koehler v. B. R. I. Co.*, 2 Black, 715; *Trustees, etc., v. Bossieux*, 3 Fed. Rep. 834; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 687-701; L. R. [1 H. L.] 93; *Peabody v. Flint*, 6 Allen, 52; *Brinkerhoff v. Bostwick*, 88 N. Y. 52; *Robinson v. Smith*, 3 Paige, 222; *King v. Talbot*, 40 N. Y. 76; *Briggs v. Spalding*, 141 U. S. 132.) The complaint does not improperly join causes of action. (*Brinkerhoff v. Bostwick*, 105 N. Y. 570; *Hale v. O. N. Bank*, 49 id. 626; *Bell v. Merrifield*, 109 id. 202; *Valentine v. Richardt*, 126 id. 277; *Briggs v. Spalding*, 141 U. S. 132; *N. P. Bank v. Goddard*, 131 N. Y. 494.)

FINCH, J. On its face and in its form this is an action at law to recover damages for negligence. The corporation, represented by its duly appointed receivers, sues individuals who were its directors for such neglect or wrong in the performance of their duties as resulted in large losses, and demands a money judgment for the damages sustained. There is no suggestion that any equitable relief is essential to a full and complete redress, and no facts are stated which indicate a need of such intervention. It is not averred that a discovery is requisite to the completeness of the remedy: on the contrary, the acts of negligence are asserted as fully known, and capable of proof. It is not alleged that an accounting is necessary to ascertain the damages, but these are claimed as a definite and fixed sum, resulting directly from the negligent acts of the defendants. It is not asserted that such defendants are severally liable for separate and personal misconduct, and in separate and different amounts, although that is a reasonable inference from the facts stated in the complaint, but demands judgment against all and against each for the full amount claimed. The circumstance led to the interposition of a demurrer to the complaint, based upon the ground that different causes of action affecting different defendants had been improperly joined. It is not denied that the demurrer is well

taken if the action is to be regarded as one at law, but the contention is that it is an action in equity for the vindication of a trust and the protection of its beneficiaries; and that view of it has been taken by the courts below with some hesitation, and with a very obvious doubt of the consistency of our earlier rulings.

I think those courts are right in saying that the formal demand of relief with which the complaint concludes is not decisive of the legal or equitable character of the action. We so held in *Bell v. Merrifield*, (109 N. Y. 202), saying that where an answer had been interposed and facts were stated in a complaint which "show that it is of an equitable nature, and that the cause of action is simply equitable, we do not think a case is made for trial by jury under the Code (§ 968), merely because the complaint improperly asks for a money judgment only." That language clearly and plainly implied that a demand of judgment for money only would stamp the action as one at law, unless the facts pleaded showed an equitable cause of action simply, and that the relief asked was, therefore, improperly confined to a money demand merely. In other words, our doctrine was that the demand of money only, on its face and primarily, characterized the action as one at law, but not so conclusively as to prevent a different result where the action was clearly equitable rather than legal in its nature, and purely legal relief is improperly demanded. But the case before us is not of that character. The facts as pleaded show a perfect cause of action at law in favor of the receivers as representatives of the bank against the directors for misconduct resulting in loss. The actual and real relation between them and the corporation is that of agents acting for their principal, (*Hun v. Cary*, 82 N. Y. 65), and the directors may be sued at law for any damages caused by their culpable misfeasance or non-feasance. Within the doctrine of the case cited the complaint before us stated a perfect cause of action to recover damages at law, and a proper and consistent demand for a money judgment awarding such damages. In the cited case the action was held to be of a legal character,

and requires the same ruling now, unless our doctrine has changed, or some valid distinction can be drawn. In support of that idea the case of *Brinckerhoff v. Bostwick* (105 N. Y. 567), is pressed upon our attention as indicating that the present action must be regarded as of an equitable character. But there is a wide and vital difference between the two cases. In this the action is by the corporation against its delinquent directors: in the other it was by a stockholder who could not sue at law but was compelled to go into equity to obtain his relief, and whose right of action was wholly and purely of an equitable character.

It may be, nevertheless, that a corporation may sue its directors in equity to recover losses sustained, for there seem to be some cases in which the remedy has been allowed. Granting that, and granting also what I am not now ready to admit as the law of this state, that the facts pleaded in the present case are sufficient to support the action as an equitable one, we are left by the pleader in a doubt which can only be solved by recurring to the demand for relief. He comes into court upon a complaint which, on the concession made, pleads an ambiguous state of facts, such as may support equally an action at law or in equity, and leaving us with no means of determining which view must prevail except by reference to the relief demanded. In such a case that relief as asked must necessarily solve the doubt, because there is no other solution. The facts pleaded do not help us, for they fit equally either a legal or an equitable action, assuming the latter to be maintainable, and we are justified in relying upon the formal relief demanded to settle the point in dispute. That accords with our system of pleading and with the distinction drawn by the Code. Where the action is for the recovery of money only it is classed as legal and is triable by a jury; and while we have held that we are not concluded by the formal demand of relief, but may look into the facts to see, nevertheless, if it be not equitable relief which they imperatively require, yet where the facts do not aid us, where they are just as appropriate to a legal as an equitable cause of action, where they

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are ambiguous as to the subject of inquiry, we must be guided by the relief asked in reaching a conclusion. That, I think, is the situation here upon the assumption most favorable to the plaintiffs, that upon the facts pleaded without further allegations an equitable action could be supported. My doubt about that is very grave, although I leave the question open. If there were further allegations showing somewhere or in some way the need of equitable intervention the difficulty would be removed. The cases of *Glenn v. Lancaster*, (21 Abb. New Cases, 272), and of *Hun v. Cary*, already cited, point to this conclusion, and are not overruled or affected by *Brinckerhoff v. Bostwick*.

It follows that the judgment overruling the demurrer should be reversed and the demurrer sustained, with costs.

All concur.

Judgment accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
HENRY MILES, Appellant.

Under the provision of the Penal Code defining murder in the first degree (§ 188), which includes the killing of a human being "by a person engaged in the commission of or attempt to commit a felony either upon or affecting the person killed, or otherwise," the word "otherwise" is not confined to felonies against property simply, but also includes a felony upon or against a person other than the one killed.

Upon the trial of an indictment for murder, in advance of the selection of a jury, and before any of the panel had been examined, the parties, by permission of the court, elected to have all peremptory challenges as to jurors determined before the juror left the witness stand, and if accepted, that the final oath be at once administered. "A juror was then called and sworn as to his qualification; after his examination by the prosecution, defendant's counsel asked if the juror was satisfactory to the People, to which the district attorney replied: "We do not challenge him for bias nor for favor." Said counsel then asked the court to direct that the prosecution should at once accept or reject the juror, and exercise its right of peremptory challenge then, if at all; this, the court refused. The juror was then examined by the prisoner's counsel and, after his examination was concluded, the court called upon the district attorney to exercise his right of peremptory challenge; he inter-

posed none, and said counsel having expressed himself satisfied, the juror was sworn. *Held*, that the ruling of the court was not error; that there was a full compliance with the provision of the Code of Criminal Procedure (§§ 385, 386) in reference to challenges.

One of the defenses interposed was insanity; after evidence had been given on the part of the defense as to the words and actions of defendant on an occasion specified, which it was claimed were so strange and inexplicable as to indicate insanity, the prosecution was allowed to show that on that occasion defendant was intoxicated. *Held*, no error.

It appeared that the person killed was shot by defendant; he, as a witness in his own behalf, testified that the fatal shot was fired, not at the deceased, but in the direction of another person. *Held*, that, assuming defendant, in an attempt to wound or kill such other person, by a false aim killed the deceased, it was murder in the first degree.

(Argued October 9, 1894; decided October 23, 1894.)

APPEAL from judgment of the Court of Oyer and Terminer of Jefferson county, entered upon a verdict rendered March 13, 1894, which convicted the defendant of the crime of murder in the first degree, and also from an order of said court denying a motion by defendant for a new trial.

The facts, so far as material, are stated in the opinion.

Wilbur F. Porter for appellant. This court is clothed with the power to grant a new trial; if it be satisfied that the verdict was against the evidence or law, or that justice requires a new trial, it should grant it. (Code Civ. Pro. § 528; Code Crim. Pro. § 385.) The court erred in permitting the witness Lester H. Baum to testify that on an occasion when trying to settle with deceased at half-past two o'clock in the afternoon, at Evans Mills, defendant was intoxicated. (*Warner v. N. Y. C. R. R. Co.*, 44 N. Y. 465.) It appeared upon the trial, by the evidence of the defendant, that in an attempt to maim Rusaw, Mary A. Ward received the discharge of the gun, from the effects of which she died. Upon this evidence the jury, upon the contention claimed for by the defendant, might have found the defendant guilty of a crime less than murder in the first degree. (Laws of 1860, chap. 410; Laws of 1873, chap. 644; *Dolan v. People*, 64 N. Y. 485; *Buel v. People*, 78 id. 492; *Cox v. People*, 80 id. 502; *People v.*

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Greenwall, 115 id. 520.) The charge, as a whole, left no doubt in the minds of the jury as to the opinion entertained by the court relative to the case and the degree of murder the defendant should be convicted of. This is contrary to the spirit and intention of criminal law and criminal trials, destroys the confidence of the jury in themselves, and breaks down the bulwark of safety in a jury trial. This was manifest throughout the trial, and is urged as a reason for a new trial. (*Wasson v. Palmer*, 13 Neb. 376; *Dingman v. State*, 48 Wis. 485; *Vedder v. Fellows*, 20 N. Y. 126.)

Virgil K. Kellogg for respondent. The defense that at the time of the alleged murder the defendant was of unsound mind and incapable of reason or judgment to appreciate the nature and quality of his act, or to know that it was wrong, is untenable. (*Brotherson v. People*, 75 N. Y. 159; Penal Code, § 17; *People v. Fish*, 125 N. Y. 153; *Flanagan v. People*, 52 id. 467; *People v. Carpenter*, 102 id. 250; *People v. Walrath*, 4 N. Y. Cr. Rep. 395; *Willis v. People*, 32 N. Y. 717; *Moett v. People*, 85 id. 379.) The charge of the trial justice as to the degree of crime committed was proper. (Penal Code, § 218; *Buel v. People*, 78 N. Y. 492.) It may be contended that the common-law indictment would not warrant the finding that Miles killed Mrs. Ward while shooting at Rusaw. This would be untenable. (*People v. Giblin*, 115 N. Y. 196.)

FINCH, J. The defendant has been convicted of murder in the first degree and sentenced to death. His counsel assails that judgment for alleged errors occurring at the trial, and also insists that upon the merits the conviction should only have been for murder in the second degree.

In advance of the selection of a jury, and before any of the panel had been examined, the mode and order of that selection came up for discussion. The court allowed the parties to choose whether all peremptory challenges should be reserved until twelve jurors had been provisionally selected, or whether

the case of each juror should be fully settled before leaving the witness stand, and if accepted the final oath be at once administered. The parties chose the latter method and the court assented.

Thereupon Walton B. Canter was called and sworn as to his qualification as a juror. He was examined by the prosecution and at the close of that examination the prisoner's counsel asked if the juror was satisfactory to the People, to which the district attorney replied, "we do not challenge him for bias nor for favor." The defense insisted that the prosecution should at once accept or reject the juror and exercise its right of peremptory challenge immediately if it meant to do so at all: and to the refusal of the court to so direct an exception was taken. The juror was then examined in behalf of the prisoner, and both examinations having been concluded, and the basis obtained for determining whether challenges should be interposed or not, the court called upon the district attorney for the exercise of his right. There was no challenge for general disqualification, nor for implied bias, nor for actual bias, and then the district attorney was called upon to exercise his right of peremptory challenge. He interposed none, and, after a few further questions, the prisoner's counsel announced himself satisfied and the juror was sworn. In this process there was full obedience to and no disregard of the provision of the Criminal Code that challenges to an individual juror must be first taken by the People and then by the defendant. (§ 385.) The next section, fixing the order of the different challenges, indicates that they might have been disposed of in that order. Practically that result was accomplished, but at all events the prisoner's counsel was in no case and in no manner compelled to challenge until after the prosecution had fully exhausted its right.

One of the defenses interposed on the trial was that of insanity. To sustain it proof was given of the conduct of the defendant at Evans' Mills on an occasion when he was trying to settle his business difficulties with Mrs. Ward, and it was claimed on his behalf that his words and actions on that occa-

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sion were so strange and inexplicable as to indicate insanity. To rebut that inference and answer the manifest tendency and purpose of the proof, the prosecution were allowed to show that on that day and that occasion the defendant was intoxicated, and that his excited and ugly conduct was explainable by that fact. The evidence was clearly admissible.

On the day of the homicide the witness Carpenter was one of the first persons who came upon the scene, and described in very considerable detail what the prisoner said, what his appearance was, and the manner of his conduct. The following question was then propounded by the defendant's counsel: "After you were over there at the house with him, before leaving for Evans' Mills, how did his acts and conversation, which you have here related upon the stand, impress you at the time as to being rational or irrational?" To this inquiry the prosecution objected that it aggregated a whole series of acts and words and called for an opinion upon that aggregation, leaving it impossible to determine upon what specific acts or words the impression of the witness was founded. The court took that view of the question and at first excluded it, but thereafter changed its ruling and explicitly allowed the question read from the stenographer's minutes to be put to the witness and answered by him. Thenceforward similar questions were asked by the defendant's counsel of other witnesses, and I have discovered no instance in which they were excluded.

The remaining objections respected the charge of the court.

The trial judge defined murder in the first degree, using for that purpose the words of the statute. In so far as that definition involved homicide while engaged in the commission of a felony the prisoner's counsel insisted that it had no application to the facts disclosed. The defendant as a witness testified that the fatal shot was fired not at Mrs. Ward, and not even at Rusaw, but in the latter's direction, without intention to kill or even to wound him, but solely to frighten him and so drive him away from the premises. The truth of that testimony was submitted to the jury, the court saying that upon

that theory the woman was shot accidentally and the prisoner was not guilty. The jury disbelieved the pretended accident and rejected the explanation, and that they were fully justified in that conclusion is apparent from two facts. If the killing of Mrs. Ward had been accidental the prisoner would have said so at the time; it would have been the first word to spring to his lips; the natural and swift explanation made to those who came upon the scene. But no such word was then uttered. His first word to Carpenter was "What are you going to do with me?" and then he said: "I have shot that woman." He proposed to carry the dead body into the house, and when Carpenter doubted their right to do so, he insisted and said: "They will electricity me." This was the evidence of Mrs. Carpenter, who did not go into the house when they carried the body in; but she adds that when they came out the defendant in answer to her remark, "You hadn't ought to done that," replied, "I don't think I had ought to, but she would have other men around her, and she slept with that hired man all night," and further added, "She has got my property all away from me." The defense called Mr. Carpenter, who not only corroborated his wife, but repeated what occurred in the house when the body was laid upon the bed. The prisoner bent over her and kissed her, and said: "Mary I have shot you — I have killed you — my God, Mary, I have killed you — but I couldn't help it — I done it because I loved you — you have lied to me — you have proved false to me and I couldn't stand it." All these expressions indicating an intentional killing, and the motive for it are utterly inconsistent with any theory of accident, which was evidently an afterthought. Beyond that the two lines of fire, towards Mrs. Ward in one direction and toward Rusaw in another, were shown to be seventeen feet apart, and made the theory of an accident quite improbable.

But assuming that Miles did shoot at Rusaw intending to wound or kill him, and by a false aim killed Mrs. Ward, the defendant's counsel contended that the court erred in describing it as murder in the first degree, and that a felony

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affecting another than the person killed will not be sufficient to make the homicide murder in that degree. The words of the statute are "by a person engaged in the commission of or in an attempt to commit a felony either upon or affecting the person killed or otherwise." (Penal Code, § 183.) The construction asserted is that the word "otherwise" relates only to felonies against property and does not include a felony upon or against a person other than the one killed. The supposed authority for this construction is *People v. Greenwall*, (115 N. Y. 520), but it decides no such proposition. In saying that the word "otherwise" cannot be changed into "another" it means only that it cannot be so narrowed and limited and that it includes a felony against property as well as against another. There was no error in the charge in this respect.

That charge was not unfair or an invasion of the province of the jury. The evidence could not be re-called and put before them in its logical order without seeming to bear heavily upon the prisoner, but they were left to find the facts and steadily instructed that no opinion of the court was intended to be expressed, or should at all influence their conclusion. No opinion was expressed upon any fact in dispute, but the testimony given was recalled so far as was needed to make plain the legal rules which it was the duty of the court to state and to explain. There was in truth no defense available to the prisoner. The proof of insanity fell far short of the legal standard, and the examination of the prisoner himself showed that he fully understood at the time the nature and quality of his act.

We see no reason for a reversal of the verdict.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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THEODORE KIRSCH, by Guardian ad Litem, et al., Respondents,
v. ORANGE L. TOZIER et al., Appellants, et al.

A person dealing with a trustee must take notice of the scope of his authority, and, while an act within his authority, done by him with intent to defraud the estate, and which accomplished that purpose, will bind the estate or the beneficiaries, as to third persons acting in good faith and without notice, where the act is beyond the scope of the trustee's authority, such third person is not protected.

Defendant L., who, pursuant to an arrangement, had bid off at a foreclosure sale certain lands in which three infants had an interest as children and heirs at law of the deceased mortgagee, upon receipt of a deed from the widow of the mortgagor of her interest in the lands, executed a mortgage thereon to defendant O. in trust for the three children for \$1,000, payable in three installments, with interest, which mortgage was duly recorded. Subsequently L. conveyed the lands to O., who thereafter, and on February 19, 1886, executed, without consideration, and acknowledged a discharge of the mortgage, which he caused to be recorded on March 9, 1886. The first installment of the mortgage was not then due. In an action by the children to reinstate the mortgage and to foreclose the same it appeared that before the execution of the discharge, O. applied to defendant, the B. Sav. Bank, for a loan on the property, which application was granted February 1, 1886. On examination of the title an abstract by the county clerk was submitted to the bank; this contained a memorandum of the mortgage, which was described as given in trust for said minor children. Across this was written: "Discharged March 6, 1886." The bank made the loan, having no notice or knowledge of the mortgage except as given by the abstract and the record of the mortgage. *Held*, that the acceptance by O. of the mortgage containing the declaration of trust was an acknowledgment of the trust and bound him to perform it; that the satisfaction of the mortgage was a breach of trust; that the bank was chargeable with knowledge of the trust, also of the facts that the relation of the trustee to the property had changed so that when he executed the satisfaction he was himself the owner of the land, and in satisfying the mortgage was dealing with the trust, and that he satisfied it before it became due; that there was no indication in the mortgage of authority in the trustee to accept payment before it became due, or to vary the trust security; that the bank was bound to inquire by what authority the trustee acted, and having failed to do so, and in the absence of proof of any affirmative power conferred upon him, it was not protected, and that plaintiffs were entitled to the relief sought.

Reported below, 63 Hun, 607.

(Argued October 12, 1894; decided October 23, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made August 16, 1892, which affirmed a judgment in favor of plaintiffs entered upon the report of a referee.

This action was brought to reinstate a mortgage executed by the defendant Lester H. Tozier and his wife to the defendant Orange L. Tozier, which was made in trust for the plaintiffs, Michael Kirsch and Theodore Kirsch, and for Peter Kirsch, now deceased, minor children of John Kirsch, to set aside a discharge of such mortgage executed by Orange L. Tozier, and for foreclosure of the mortgage and sale of the mortgaged premises for the benefit of the persons named as *cestui que trust*.

The lands in question consist of 102 acres situate in the town of Sheldon, Wyoming county, New York, of which John Kirsch died seized in the year 1872. On the 8th day of January, 1873, the defendant Orange L. Tozier was appointed general guardian of the infant children, Michael J., Theodore and Peter Kirsch. At the time of his death John Kirsch owed debts which, with the incumbrances upon his real estate, exceeded the value of both his personal and real property. Orange L. Tozier and Elizabeth Kirsch, the latter the widow of the deceased, were appointed administrators of the estate of John Kirsch. Subsequently to this it was agreed between them and Lester H. Tozier, a son of Orange L. Tozier, that they should purchase the mortgages then existing on the farm, foreclose them, and procure a title to the land, and convey the same to Elizabeth Kirsch, who should, in turn, by mortgage thereon, secure to Lester H. Tozier the amount paid by him, and give a mortgage upon the farm of \$1,000 to these three children. This arrangement was carried out, except that upon a sale of the lands, either by direct purchase at the sale or by deed coming immediately from the purchaser, Lester H. Tozier became the owner for the consideration, in all, of \$1,131.56. Thereupon it was further arranged between Orange L. Tozier and the widow, Elizabeth Kirsch, that the widow should convey to the then holder of the title, Lester H.

Tozier, all her interest in the lands to which she was entitled as widow, and that a mortgage should be executed by Lester H. Tozier to Orange L. Tozier, in trust for the three children, in the sum of \$1,000, one-third thereof payable to each of the three children when he should arrive at age, with interest in the meantime. Having received the deed from Mrs. Elizabeth Kirsch, Lester H. Tozier and his wife executed to Orange L. Tozier, in trust for Michael Kirsch, Peter Kirsch and Theodore Kirsch, "minor children of John M. Kirsch, deceased," the mortgage in question, dated the 15th day of October, 1875, expressing a consideration of \$1,000, payable as follows: The sum of \$333.33 November 13, 1887; the sum of \$333.33 March 18, 1891, and the sum of \$333.33 October 6, 1892, with interest payable annually from the 1st day of April, 1876. This instrument was delivered to Orange L. Tozier, who caused the same to be recorded in the proper clerk's office on the 23d day of October, 1875. The mortgagee and trustee paid the interest upon this mortgage to Elizabeth Kirsch, the mother of the children, in pursuance of a previous arrangement, until the spring of 1886, since which time no part of the principal or interest has been paid thereon by the trustee for the benefit of either of the children.

On the 3d day of September, 1883, Lester H. Tozier and his wife executed and delivered a deed of the farm to Orange L. Tozier, at a consideration, as expressed in the deed, of \$4,000, and the record title of such farm has since been in Orange L. Tozier. After acquiring this title, and on the 19th day of February, 1886, Orange L. Tozier executed and acknowledged a discharge of the mortgage, and caused the same to be recorded in the proper clerk's office on the 9th day of March, 1886. On the 27th day of January, 1886, before the execution of such discharge, Orange L. Tozier applied to the defendant, the Buffalo Savings Bank, for a loan of \$2,000 upon his farm, which application was granted on the 1st day of February, 1886; and on an examination of the title of such farm, submitted to the officers of the bank, there was an abstract certified by the proper clerk of Wyoming county to

the effect that Orange L. Tozier appeared to be the owner of the farm. On such abstract a memorandum of the mortgage, sought by this action to be reinstated, described the mortgage simply as being given for \$1,000 and interest, "in trust for Michael Kirsch, Theodore Kirsch and Peter Kirsch, minor children of John M. Kirsch, deceased," having written across the face of the memorandum as follows: "Discharged March 9, 1886, E. M. Jennings, Clerk." The defendant, the Buffalo Savings Bank, at the time of taking its mortgage and advancing the money thereon, had not, either through any of its officers or attorneys, any knowledge or notice of the existence of this mortgage now sought to be reinstated in this action, except the memorandum on the abstract of title of its discharge, and the constructive notice given by the record of such mortgage.

Adolph Rebadow and Johnson & Charles for appellants. This action cannot be maintained by the plaintiffs for the relief asked for in the complaint. The title to the estate is in the defendant Orange L. Tozier, and the promise to pay was made to him and to no other person. (*N. R. R. Co. v. Nolan*, 48 N. Y. 513; *Wetmore v. Porter*, 92 id. 76; *Boon v. C. S. Bank*, 48 id. 83; *Mabie v. Bailey*, 95 id. 206; *Bunn v. Vaughan*, 1 Abb. Ct. App. Dec. 253; *Perry on Trusts*, §§ 225, 321, 613, 814; *McPherson v. Rollins*, 107 N. Y. 316.)

Spencer Clinton for the Buffalo Savings Bank, appellant. The Buffalo Savings Bank was not chargeable with notice that Mr. Tozier had no authority to discharge the mortgage in question. (*Field v. Schieffelin*, 7 Johns. Ch. 150; *Bogert v. Hertell*, 4 Hill, 492; *Swarthout v. Curtis*, 5 N. Y. 301; *Acer v. Westcott*, 46 id. 354; *Briggs v. Davis*, 20 id. 15.)

F. C. Peck and Frank W. Brown for respondents. It appears by an examination of the case that the appellants made no requests for findings, and, hence, the question of whether the findings were against the weight of evidence is not presented by any exception contained in the record. (*Hugo v. Shank*, 4 N. Y. Supp. 929.) Plaintiffs can maintain

this action. (Code Civ. Pro. §§ 488, 499; *Hubbell v. Medbury*, 53 N. Y. 102; *Dodge v. Stevens*, 94 id. 209; *Waterman v. Webster*, 108 id. 158.) The mortgage in question in terms recites that it is given to Orange L. Tozier in trust for the plaintiffs, the children of John Kirsch, deceased, naming each of them, and the execution and delivery thereof to Orange L. Tozier, in trust, made him trustee of an express trust. (Code Civ. Pro. § 449; *Nathaway v. Payne*, 34 N. Y. 107; *Worrell v. Munn*, 5 id. 238; *Braymon v. Bingham*, 32 id. 491; *People v. Bostwick*, 26 id. 483; *Wallace v. Burdell*, 97 id. 14.) The record of this mortgage, which recited on its face that it was executed and given in trust for these infants, was constructive notice to the defendant, the Buffalo Savings Bank, that Michael J. Kirsch, Peter Kirsch and Theodore Kirsch each had a beneficial interest in the execution of the trust so created. (*Waterman v. Webster*, 108 N. Y. 165.) The order of the Special Term, granting an additional allowance of costs, and the decision of the General Term, modifying and affirming such order, was right. (Code Civ. Pro. § 3253.)

ANDREWS, Ch. J. The only serious question presented on the record arises on the claim of the Buffalo Savings Bank, that it was not chargeable with notice nor put upon inquiry to ascertain that the defendant Tozier had no authority to discharge the mortgage in question. The savings bank, when it took its mortgage, had constructive notice of every fact which could have been ascertained by an inspection of the deeds, or mortgages, on record in the chain of title. An inspection of the records would have disclosed the mortgage given by Lester H. Tozier in October, 1875, and that it was given "in trust" for the three minor children of John M. Kirsch, deceased; that the lands covered by the mortgage were subsequently, in 1883, conveyed by Lester H. Tozier to Orange L. Tozier, the mortgagee named in the mortgage given in trust for the minor children of John M. Kirsch; that after such conveyance, and in March, 1886, Orange L. Tozier, then

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being the owner of the lands and also the mortgagee "in trust," in that mortgage, himself executed and caused to be recorded a satisfaction of the mortgage, and that this occurred before any part of the sum secured by the mortgage had become due. There can be no doubt that the satisfaction of the mortgage was as to the defendant Orange L. Tozier a breach of trust. The satisfaction was without consideration. The question whether Tozier held the mortgage as trustee impressed with a trust in favor of the three children of John M. Kirsch, admits of no doubt. The implication from the nature of the instrument, the character of the beneficiaries and the division of the payments into three equal parts, payable at specified but different dates in the future, is that the instrument was intended to secure to the several beneficiaries as they became of age an equal share of the sum for which the mortgage was given. The acceptance by Orange L. Tozier of the mortgage containing the declaration of the trust was an acknowledgment of the trust on his part and bound him to perform it. The trust was expressed in the instrument, although not fully set out in words, and any act thereafter done by him in contravention of the trust was by the common law and by the statute void. (St. Uses and Trusts, 1 Rev. St. § 65.) The discharge of the mortgage was not intended for the benefit of the infants, but to deprive them of the benefit of the security, and, as we have said, was a plain breach of trust. The bank knew, or must be presumed to have known, when it took its mortgage, because an examination of the records would have disclosed the facts, (1) that the mortgage was taken by Tozier in trust for infants; (2) that he satisfied it before it became due; (3) that his relation to the property had changed, so that when he executed the satisfaction he was himself the owner of the land, having an adverse interest to those beneficially interested in the security, and (4) that in satisfying the mortgage he was dealing with himself. Persons dealing with a trustee must take notice of the scope of his authority. An act within his authority will bind the trust estate or the beneficiaries as to third persons acting in good faith and without notice, although

the trustee intended to defraud the estate, and actually did accomplish his purpose by means of the act in question. It has frequently been held that a person dealing with an executor, administrator or trustee, who, from the nature of his office, or by the terms of the trust, has power to satisfy or transfer the securities of the estate, or to vary the investment from time to time, is not bound to go further and ascertain whether in fact the act of the executor or trustee is justified, and that no breach of trust was intended. It is sufficient for his protection that he acts in good faith, and if the act of the executor or trustee is justified by the terms of the power, the party dealing with him is protected. (*Fuld v. Schieffelin*, 7 Jo. Ch. 153.) But circumstances were disclosed by the record when the bank took its mortgage, which precluded the bank from relying upon the recorded satisfaction of the prior mortgage. There was no indication in the mortgage that any power was vested in the trustee Tozier to accept payment of the mortgage before it became due, or to vary the trust security. There was no such affirmative power conferred upon him in fact, and the case of *McPherson v. Rollins* (107 N. Y. 316) seems to be a decisive authority that there is no implication of such a power in case of a trustee of a specified security for the benefit of minors, and no other evidence of his actual authority exists than may be implied from the fact that he is trustee of the security. The rule declared in that case operated with great severity upon one who, without any actual notice, bought the property upon an official certificate that no lien existed on the premises, paying full value therefor. There the mortgage was given to secure the payment of an annuity to the mortgagee, and also annuities to two minors until they should become of age. The mortgagee afterwards, and before the expiration of the minority of the two children, without consideration, assumed to discharge the mortgage and the satisfaction was duly recorded. It was held that the trustee had no power to satisfy the mortgage before the termination of the trust, and that the purchaser was not protected. It is difficult to perceive any solid distinction between that case

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and the present. In *McPherson v. Rollins* there was no express direction that the mortgage security should remain unchanged during the term of the trust. It was given to secure annuities presumably for maintenance. Here the mortgage was given to secure a gross sum, for the benefit of infants, the shares being payable, as was to be inferred, on their severally attaining full age. There is a very pregnant circumstance in the present case bearing upon the point of constructive notice. The bank relied upon a discharge by Tozier of a lien held by him as trustee on his own land. The transaction as disclosed by the record showed that in executing the satisfaction Tozier was dealing with himself, and that the act was in his own interest, and not only so, but that the mortgage was not due. Tozier was acting in the double capacity of owner of the land and trustee of a lien thereon for other persons. The transaction was unusual and special and the savings bank with knowledge of Tozier's relation to the land as owner and trustee was, we think, bound to inquire by what authority he acted, and if inquiry had been made the invalidity of the transaction would or might have been disclosed. What circumstances will amount to constructive notice or will put a party upon inquiry is, in many cases, a question of much difficulty. A purchaser is not required to use the utmost circumspection. He is bound to act as an ordinarily prudent and careful man would do under the circumstances. He cannot act in contravention to the dictates of reasonable prudence or refuse to inquire when the propriety of inquiry is naturally suggested by circumstances known to him. The circumstances of this case made it, we think, the duty of the bank to inquire in respect to the authority of Tozier to discharge the prior mortgage, and having failed to do so, is not entitled to protection as a *bona fide* purchaser. (*Baker v. Bliss*, 39 N. Y. 70 and cases cited; *Story Eq. Jur. sec. 400 et seq.*) The other questions are satisfactorily disposed of in the opinions of the referee and at General Term, and do not require further elaboration.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

FREDERICK MARSTALLER, Respondent, v. OGDEN MILLS et al.,
as Trustees, etc., Appellants.

A cause of action against a domestic business corporation for injuries caused by its negligence does not abate upon its dissolution, but survives, and an action thereon is maintainable against the trustees holding the corporate property for the purposes of distribution. (§ 5, chap. 691, Laws of 1892; § 30, chap. 697, Laws of 1892.)

Within the meaning of the provision of the "General Corporation Law" (Chap. 687, Laws of 1892), which provides that, upon the dissolution of a corporation, its directors or managers shall, unless other persons are appointed, be the trustees of the "creditors and stockholders," the word "creditors" includes all those to whom the corporation was under any enforceable obligation at the time of its dissolution, as well as those to whom it was indebted.

(Argued October 22, 1894; decided October 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made September 18, 1894, which affirmed an interlocutory judgment in favor of plaintiff entered upon an order of Special Term overruling a demurrer to the complaint.

This action was brought against defendants, as trustees of the creditors and stockholders of the Mergenthaler Printing Company, to recover for the loss of services of plaintiff's son, because of injuries alleged to have been received by him through the carelessness and negligence of said company, which had been dissolved before the action was commenced.

Defendant demurred to the complaint on the ground that the cause of action did not survive the dissolution of the company, and could not be maintained against defendants as trustees of its creditors and stockholders.

William John Warburton for appellants. Under the common law no cause of action against a corporation can survive the dissolution of the latter. (2 Wait's Act. & Def. 350; 2 Morawetz on Corp. 987; *Owen v. Smith*, 31 Barb. 641.)

Plaintiff's action must, therefore, be based on statute. (*McCulloch v. Norwood*, 58 N. Y. 568; *People v. Walker*, 17 id. 503; Laws of 1832, chap. 295.) No statute exists to support the action. (Laws of 1892, chap. 687 § 30; Laws of 1880, chap. 245, § 10.) The statute is for the benefit of creditors. (2 Potter on Corp. § 831.) The plaintiff is not a creditor. (*Edmond v. Bullard*, 16 Hun, 65; *Heacock v. Sherman*, 14 Wend. 58; *Jones v. Graham*, 77 N. Y. 628; *Noyes v. Blakeman*, 6 id. 567; *Luthrop v. Singer*, 39 Barb. 396; *Norris v. De Wolf*, 12 Hun, 666; *Cregin v. B. C. R. R. Co.*, 75 N. Y. 193; *Bohn v. Brown*, 33 Mich. 257.) The cause of action originally possessed by the plaintiff against the corporation did not survive the death of the tortfeasor. (*Bank of Selma v. Colby*, 21 Wall. 609; *Greely v. Smith*, 3 Story, 658; *Pendleton v. Russell*, 144 U. S. 640; *Price v. Price*, 11 Hun, 301; *Zabriskie v. Smith*, 13 N. Y. 322; *Whitford v. R. R. Co.*, 23 id. 465; *Stokes v. Stickney*, 96 id. 323.)

James C. Cropsey and *Charles J. Patterson* for respondent. The cause of action is not one which is extinguished by the death of either the person injured or the wrongdoer, but is one which under the statute survives. (*Cregin v. B. C. R. R. Co.*, 75 N. Y. 192; *Scott v. Brown*, 24 Hun, 620; *Foels v. Town of Tonawanda*, 20 N. Y. Supp. 447.) Even if we admit that the sections of the Revised Statutes are not applicable to actions against corporations, there is another statute expressly relating to business corporations which, in effect, states that actions in tort against them survive their dissolution. (Laws of 1892, chap. 691, § 5; Laws of 1875, chap. 611, § 38.) This action is properly brought against the directors of the dissolved corporation. (Laws of 1892, chap. 687, § 30.)

GRAY, J. Plaintiff brings this action against the defendants, as the trustees of the creditors and stockholders of the Mergenthaler Printing Company, a domestic business corporation, to recover for the loss of services of his son; who was injured while in the employment of the company. Subse-

quently to the time when he received these injuries, that corporation was dissolved, in the course of proceedings for its voluntary dissolution, and the sole question, which is presented by the demurrer to the complaint, is whether the cause of action survived the dissolution and is maintainable against the defendants. If provision has not been made in the statute law of this state, whereby such a cause of action is preserved from abatement, the common-law rule would undoubtedly be in force and the plaintiff's remedy would be gone. We think that such is not the case and that, upon a fair reading and by a reasonably liberal construction of certain statutory provisions, the plaintiff retained his remedy in the form he has adopted.

In the "Business Corporations Law" (Laws 1892, chap. 691, § 5) is contained the following section :

"PAYMENT OF CAPITAL STOCK.—One-half of the capital stock of every such corporation shall be paid in within one year from its incorporation, or the corporation shall be dissolved. * * * The dissolution of any such corporation for any cause shall not take away or impair any remedy against it, its stockholders or officers, for any liabilities incurred previous to its dissolution."

The last sentence of this section was taken, with a slight change of verbiage, from the statute as it was enacted in 1875 (Laws 1875, chap. 611, § 38); where it stood as a distinct section. Although it was inserted in connection with a provision made for the event of a failure to pay in the capital stock, its language is too comprehensive to warrant us in attributing any other legislative intent, than what the plain reading conveys. Inartificial as may be the insertion of this clause in the section, it cannot be qualified by what precedes and it reaches beyond the contingency of the particular dissolution previously referred to and applies to any, that is to every, case of corporate dissolution.

The plaintiff's cause of action arose upon a wrong having been done to his rights or interests, for which the corporation could be held liable, and if it has survived, by force of the

statutory provisions mentioned, we think he is entitled to be classed with the "creditors;" for whom, in another provision, the directors of the corporation become trustees. It was enacted in the "General Corporation Law" (Chap. 687 of the Laws of 1892) as section 30 and reads:

"Upon the dissolution of any corporation created, or to be created, and unless other persons shall be appointed by the legislature, or by some court of competent authority, the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts and divide among the stockholders the moneys and other property that shall remain after the payment of debts and necessary expenses."

We think that the legislature intended by this provision that the corporate property should be held and administered upon by the directors, where other persons were not appointed, for the purpose of its distribution in the settlement of all existing claims upon it; whether the claimant was a creditor in the legal sense, or not. The term "creditor" is broad enough, in view of the evident purpose of this act and of the other provision we have mentioned, to include those persons, to whom the corporation was under any enforceable obligation, as well as those to whom it was indebted. If the general investment of the directors with the power "to settle the affairs of the corporation" were to be regarded as qualified and as limited, with respect to the payment of claims against it, to those which constituted debts, in the strict legal sense of the word, the legislature would be chargeable with a very grave inconsistency. It would have expressly retained all the remedies against a corporation for any liabilities incurred previous to its dissolution; while limiting the power of its trustees, upon a voluntary dissolution, to the consideration and payment of those liabilities only which arose upon contract. This would be a harsh construction and one which does not

seem in harmony with the general scheme of legislation. If this had been the case of an individual wrongdoer, his death would not have caused the abatement of the cause of action for the wrong done by him to the property rights or interests of the plaintiff. That case has been expressly provided for and the action would be maintainable against his executors or administrators. (2 R. S. 447, §§ 1, 2, and see *Cregin v. R. R. Co.*, 75 N. Y. 192.) We do not think a discrimination has been intended in favor of corporations. The language of the section admits of the criticism that it fails to express clearly the intention that a liability upon tort is to be considered and met by the trustees; but, reading together section 5 of the Business Corporations Law and section 30 of the General Corporation Law, the construction is permitted that all persons, who have claims against the corporation, upon which it might be liable, should be regarded as actual or possible creditors.

The interlocutory judgment should be affirmed, with costs; with leave, however, to the appellants to answer the complaint within twenty days after service of the notice of the entry of the order upon our remittitur and on payment of costs.

All concur.

Judgment accordingly.

HENRY L. BEAKES, Respondent, v. THE PHOENIX INSURANCE COMPANY of Hartford, Conn., Appellant.

A policy of insurance contained a clause declaring that "this policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or wind storm)." In an action on the policy plaintiff's evidence was to the effect that the buildings insured were struck by lightning, and that immediately thereafter a high wind came up; it also appeared that part of the damage done was due to the wind. The court charged the jury in substance, among other things, that if they found that the buildings were struck by lightning, and this was the primary cause of the loss, plaintiff was entitled to

recover the whole loss, although the wind increased the damage. The court also refused to charge that "the jury must strictly confine their verdict to the actual damage done by the lightning, and cannot give a verdict for the damage done by the wind." *Held*, error; that under the policy the recovery should have been limited to the direct loss or damage done by the lightning.

(Argued October 17, 1894; decided October 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 28, 1893, which affirmed a judgment in favor of the plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

William Vanamee for appellant. The language of the contract is that the liability of the company is "in no case to include loss or damage by cyclone, tornado or wind storm." Even if these words and the lightning provision had not been found in juxtaposition, they would still constitute a complete bar to the instruction by which the jury were permitted to include in their verdict any damage whatever caused by the wind, whether related to lightning or any other primary cause. (*St. John v. A. M. F. & M. Ins. Co.*, 11 N. Y. 516; *Strong v. S. M. Ins. Co.*, 31 id. 103.) The whole discussion precipitated into the case by the trial court as to primary cause was confusing and misleading to the last degree. The contract had plainly separated the two possible causes of injury, and had provided that injuries produced by one cause could not be referred to the other cause. The effect of the fanciful rule of damages laid down by the court was to make these two causes inter-dependent and inter-penetrating; to blend them indissolubly in the minds of the jury and to obliterate the distinction which the contract had so carefully preserved. (Sedgwick on Dam. § 122.) The case was sent to the jury under the instruction that if the buildings were weakened, and if, without the presence of the wind, the

injury would have stopped, but, with the presence of wind, the building was prostrated, still the whole damage done by the wind could be included in their verdict. This was erroneous. (*Beakes v. C. U. Ins. Co.*, 47 N. Y. S. R. 406.) The duty resting upon the courts to so construe exceptions contained in policies as to give to them some force and effect is well settled. (*Briggs v. N. A. & M. Ins. Co.*, 53 N. Y. 447; *Everett v. L. A. Co.*, 19 C. B. [N. S.] 126.)

William F. O'Neill for respondent. The rule that the contract of insurance should be construed most strongly against the company should be applied in this case. (*Rann v. H. Ins. Co.*, 59 N. Y. 387; *Herman v. M. Ins. Co.*, 81 id. 187.)

BARTLETT, J. This is an appeal from a judgment of the General Term of the second department, affirming a judgment, and from an order denying a new trial in an action tried at the Orange Circuit, in which the jury rendered a verdict in favor of the plaintiff for the sum of eleven hundred dollars in an action upon a policy of insurance covering the plaintiff's two barns and contents, located on his farm, about a mile from the city of Middletown.

The plaintiff claims that on Sunday, the 10th of August, 1890, during a severe thunder storm, his barns were struck by lightning, and by reason thereof were destroyed, with their contents.

The defense interposed is that the barns and contents were swept away and destroyed by, and solely in consequence of, a violent wind storm, tornado or cyclone, and were not struck by lightning.

Two facts are admitted in this case, that no one saw the demolition of the barns, and that there was no actual ignition, fire playing no part in the disaster.

The plaintiff seeks to recover under the lightning clause of the policy, which reads as follows, viz.:

"Lightning.—It is understood and agreed that this policy shall cover any direct loss or damage caused by lightning

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(meaning thereby the commonly-accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or wind storm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy."

The issue thus presented was very thoroughly tried, and resulted in a direct conflict of evidence; the witnesses for the plaintiff testified that there was abundant evidence that the buildings had been struck by lightning, and that the wind came almost immediately after the lightning stroke; the witnesses for the defendant found no evidence of lightning. There was also a great conflict between the witnesses as to the force of the wind which followed the lightning; some of plaintiff's witnesses said it was blowing very hard, while many of defendant's witnesses described the force of the wind as being very unusual and severe, doing great damage to buildings in the immediate neighborhood.

It seems to have been assumed by the learned trial judge in his charge to the jury that it might be fairly inferred from the evidence that part of the damage wrought on this occasion was due to the wind. It becomes necessary to examine this charge, as the defendant and appellant insists that it contains legal error which must lead to a reversal of the judgment. Near the opening of his charge the trial judge uses this language, viz.:

"It is the claim of the plaintiff that these buildings were destroyed by lightning, and, therefore, he claims that they come within the clause of the policy which does cover any direct loss, which does insure him against direct loss or damage caused by lightning. It is the contention of the defendant, on the other hand, that the destruction to the building was not caused by lightning, but was caused by a violent wind storm, by some denominated as a cyclone, and by some called a tornado, but the contention is that the destruction was caused by the wind and not by the lightning. If it was caused by the wind then the loss is not covered by this policy, as you see. But if it was caused by the lightning then it is."

To this language no exception could be properly taken, but later in his charge the trial judge stated to the jury as follows, viz.:

“If you find that this building was destroyed by lightning, then you will have to find what it was that wrought the damage, because there was there, as you will probably have no difficulty in finding, the presence of a high wind, and if this destruction, if part of this destruction, was wrought by the wind, then it is not destruction or damage by lightning. But there is another rule. You will have, in the consideration of this question of damages, to settle this question of fact, you are to say whether the lightning was the primary cause, what we call the first cause, the approximate cause, as we call it in law. If you find it was then you may attribute the loss to that, although you may find that by reason of the presence of the wind more destruction was wrought. That is to say, that the roof was blown over into the field, that the destruction was more complete. If you should find that these buildings were struck by lightning, that they were weakened and in a reeling condition or rent apart by lightning and moved from the foundation, then, without the presence of wind that would have stopped; but with the presence of wind and with that opening in the building made by the lightning, that they were prostrated by the wind, if you find that the lightning was the primary cause of the destruction, then you may allow him the whole damage, but you will have to be careful about that and discriminate. I think you understand it. If that was the primary cause, and although the wind made more damage, you may allow him the whole of his loss, as though it was caused by lightning.”

The defendant's counsel excepted to the portion of the charge, to quote his own language, “in which your honor charges in substance that if the lightning was the primary cause of the loss, and the loss was accelerated or increased by wind, the whole damage can be recovered.” He also requested the court to charge “that if lightning struck the buildings and did some damage, and the wind came on and did the main

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damage, the jury must strictly confine their verdict to the actual damage done by the lightning and cannot give a verdict for the damage done by the wind." This request was refused and we think it was error.

The lightning clause of the policy, already quoted, is very carefully worded and limits the liability of the company to the direct loss caused by lightning, and expressly excludes damage by cyclone, tornado or wind storm.

It must be admitted that the duty of a jury in cases of this character is difficult to perform. If a building is shattered by a lightning stroke, but not prostrated, and a moment later a high wind completes the work of destruction, it is not an easy task for counsel to prove the plaintiff's case, or for the jury to determine the amount of recovery, and apportion the loss between lightning and wind. Courts are required, however, to enforce contracts as drawn by the parties, and under this lightning clause in the standard policy juries must be required to limit the recovery of plaintiff's to the direct loss or damage caused by lightning.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment accordingly.

THE PEOPLE ex rel. JOHN F. MITCHELL, Respondent, v. JAMES J. MARTIN et al., Commissioners, etc., Appellants.

Under the provisions of the New York Consolidation Act (§ 273, chap. 410, Laws of 1882), declaring that "absence without leave of any member of the police force for five consecutive days shall be deemed and held to be a resignation, and the member so absent shall at the expiration of said period cease to be a member of the police force," the absence that will deprive a member of his place must be voluntary and intentional. Where, therefore, a member of the force was dismissed for absence without leave for over five days, and it appeared that the absence was not his conscious act, but the result of temporary mental aberration, *held*, that the dismissal was error.

(Argued October 22, 1894; decided October 30, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made June 14, 1894, which reversed a determination by defendants as commissioners of police of the city of New York dismissing the relator from the police force and directed his reinstatement.

The facts, so far as material, are stated in the opinion.

David J. Dean for appellants. By force of section 273 of the Consolidation Act, in consequence of absence without leave for five consecutive days, the relator vacated his office, ceased to be a member of the police force, and became liable to be dismissed therefrom without notice. (Laws of 1873, chap. 335, § 47; *People ex rel. v. Police Comrs.*, 114 N. Y. 245.)

Edmund Luis Mooney for respondent. The reversal by the General Term of the determination of the commissioners being upon the facts, this court will not review the order appealed from. (*People ex rel. v. French*, 123 N. Y. 636.) The absence of the relator from duty was neither conscious, voluntary nor blamable, and the case was, therefore, not within the language or intendment of the statute. (Laws of 1882, chap. 410, § 273; *People ex rel. v. Bd. of Police*, 114 N. Y. 245; *People ex rel. v. French*, 119 id. 502; *People v. Bartlett*, 3 Hill, 570; *People v. Manning*, 8 Cow. 297; *Harmony v. Bingham*, 12 N. Y. 99, 107; *Wolfe v. Howes*, 20 id. 201; *Cobb v. Harmon*, 23 id. 148, 150; *Wilckens v. Willett*, 40 id. 521; *Cohen v. N. Y. L. Ins. Co.*, 50 id. 617; *U. S. v. Thomas*, 15 Wall. 337-355; *Taylor v. Taintor*, 16 id. 366, 377.)

BARTLETT, J. The police commissioners dismissed the relator from the police force of the city of New York; the General Term of the Supreme Court reversed that decision upon the law and the facts and ordered the reinstatement of the relator. From that order the commissioners appeal to this court.

There were two charges made against the relator, viz.: First, absence without leave; second, failure to appear against

a prisoner. Both charges rest upon the same state of facts. The relator admitted his absence, but sought to justify it on the ground it was not his conscious act, but the result of temporary mental aberration which led him to absent himself from his family and the city of New York for a period of about eight days. The reversal of the determination of the commissioners by the General Term being upon the facts as well as the law, and resting as it does upon abundant evidence, it remains for us to decide whether, as matter of law, the defense established was a good answer to the charges upon which the relator was tried.

The contention of the appellants in this court relates solely to the force and effect of section 273 of the Consolidation Act, which provides as follows: "Absence, without leave, of any member of the police force, for five consecutive days, shall be deemed and held to be a resignation, and the member so absent shall, at the expiration of said period, cease to be a member of the police force, and be dismissed therefrom without notice."

The appellants insist that this statute is to be construed according to its literal reading, and that absence without leave for any cause, however justifiable and beyond control, which continues for five consecutive days, justifies the commissioners in dismissing the absentee without notice, and there is no possible defense that can be interposed except where the absence is compelled by the unjustifiable act of the authorities to whom the relator owes obedience. This court in the case of *Nugent* (114 N. Y. 245) held that his absence was an obedience to the command of the law, and not, therefore, within the intendment of the statute. The appellants seek to distinguish the *Nugent* case from the one at bar by the fact that *Nugent's* absence was due to the unjustifiable act of his superior officers.

We fail to apprehend the soundness of any such distinction. The statute under consideration, when reasonably construed, will lead to no such result as to deprive an honorable police officer of his place on the force by reason of absence arising

from the act of God. The absence that will deprive the officer of his place must be voluntary and intentional. It is such an act alone that can be deemed a resignation and justify the commissioners in acting without notice to the relator.

It is urged in support of the strict and literal construction of this statute that the police force of the city of New York is in many respects like a military organization, and the legislature has evinced the determination to maintain its efficiency by compelling the dismissal of absentees in order that their place may be filled and the efficiency of the force maintained. It is doubtless true that the legislature intended to make this statute one of unusual strictness and severity as conserving the discipline of the police force, and it is the duty of the courts to see that it is rigidly enforced. It does not follow, however, that when absence under this statute is caused by the act of God, that its penalties are to be visited upon the absentee; such a construction would not only do violence to the natural sense of justice, but would be contrary to a long line of authorities. Many of the cases are cited and commented on in the *Nugent Case* (114 N. Y. 248, 249, 250). After so citing them the court goes on to say: "The cases referred to establish the principle that, in matters of contract, a party may be relieved from the consequences of the obligation to perform when performance is prevented by the act of God, or the exercise of a superior power residing within the sovereignty of the state. The same principle has been held to relieve a party from the obligation imposed by the statute."

It was further urged in support of the appellants' contention that if such an absence as the relator's is not ground for dismissal, and his attacks continue, he must be permitted to remain on the force to its great detriment. The answer to this contention is found in section 250 of the Consolidation Act, which provides as follows * * * "that any member of the police force who is now, or who may hereafter become, insane or of unsound mind so as to be unable or unfit to perform full police service or duty, may be removed and dismissed from the police force by resolution of the board of police." If mere

temporary aberration gives place to a more serious form of mental malady, so that a member of the police force is unable or unfit to perform full police service or duty, then the statute provides an abundant and summary remedy for dismissal.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent, v. HENRY WELSH et al., Appellants.

The legislature has power to authorize a foreign railroad corporation, lawfully operating its road within this state, to acquire by condemnation additional lands required for railroad purposes.

Such a corporation, in the contemplation of the statutes of the state and to the extent of its existence and operation here, is *pro hac vice* a state corporation.

Accordingly *held*, that the term "every railroad corporation" in the General Railroad Law (§ 4, chap. 565, Laws of 1892), and, *it seems*, the term "all existing corporations" in the General Railroad Act of 1850 (Chap. 140, Laws of 1850) includes foreign railroad corporations, which under authority of law have extended and are operating their roads in this state, and that under the former act (§ 7) such a corporation had authority to acquire by condemnation additional real estate when needed for the proper operation of its road and to meet the public demands of travel and traffic.

(Submitted October 18, 1894; decided October 30, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made the second Monday of February, 1893, which affirmed an order of Special Term denying a motion by defendant to dismiss the petition of the plaintiff for the condemnation of certain lands belonging to defendants for railroad purposes.

The facts, so far as material, are stated in the opinion.

Martin J. Keogh for appellants. A foreign corporation can acquire no right to condemn lands in this state unless such right is expressly conferred by statute. This rule applies equally to all corporations, foreign or domestic. The statute

delegating the right to exercise the power of eminent domain, being a right in derogation of common law, must be construed strictly and cannot be extended by implication. (*People v. Smith*, 21 N. Y. 595; *N. Y. C. & H. R. R. Co. v. Kipp*, 46 id. 546; *In re Comrs. Central Park*, 50 id. 493.) It is a well-settled rule of construction that a general law cannot repeal, modify or extend a special law by implication. (*Whipple v. Christian*, 80 N. Y. 523; *McKenna v. Edmundstone*, 91 id. 231; *People v. Jaehne*, 103 id. 182; *In re Comrs. of Central Park*, 50 id. 493; Laws of 1850, chap. 140, §§ 13, 49; Code Civ. Pro. § 3359.) The order made by the county judge of Westchester county denying the application of the village of New Rochelle to condemn this property has never been modified or reversed and is *res adjudicata* and binding upon the plaintiff in this proceeding. (*Pray v. Hegeman*, 98 N. Y. 351; *Marsh v. Masterton*, 101 id. 401; *C. P. Co. v. Walker*, 114 id. 7; *Decker v. Decker*, 108 id. 134; *Lorillard v. Clyde*, 122 id. 41; *Leavitt v. Wolcott*, 95 id. 212; *Parkhurst v. Hendell*, 10 id. 386.)

Page & Taft for respondent. The plaintiff had authority to take this proceeding to acquire land for railroad purposes. (*Johnson v. H. R. R. Co.*, 49 N. Y. 455; *In re N. Y. C. R. R. Co.*, 4 Hun, 381; Laws of 1890, chap. 565; *Mangam v. City of Brooklyn*, 98 N. Y. 591; *Mosier v. Hilton*, 15 Barb. 657, 665; *Clarkson v. H. R. R. Co.*, 12 N. Y. 304; *Demarest v. Flack*, 128 id. 205; *N. Y. & E. R. R. Co. v. Young*, 33 Penn. St. 175; Code Civ. Pro. § 3359.) The issues of fact made by the general denial of the allegations of the petition are judicial questions to be determined from the evidence and circumstances of the case. (*In re N. Y., L. & W. R. Co.*, 35 Hun, 220, 229; *In re Rensselaer v. S. R. R. Co.*, 43 N. Y. 137, 144; *In re N. Y. & H. R. R. Co. v. Kip*, 46 id. 552; *In re N. Y. C. R. R. Co.*, 66 id. 407, 410; *In re N. Y. C. R. R. Co.*, 77 id. 264.) This court will not review the conclusion of the Supreme Court upon these questions. (*In re U. E. R. R. Co.*, 113 N. Y. 275, 282; *In re Thomp-*

son, 121 id. 277; *In re City of Rochester*, 137 id. 243; *In re Middletown*, 82 id. 200; *In re Marsh*, 71 id. 318; *In re P. P. & C. I. R. R. Co.*, 67 id. 377.) The questions involved herein are not *res adjudicata*. (Laws of 1872, chap. 440; Laws of 1867, chap. 176; Laws of 1864, chap. 249.)

GRAY, J. This proceeding was instituted by the New York, New Haven and Hartford R. R. Co., a corporation organized under the laws of the state of Connecticut, to condemn, for railroad purposes, certain lands of the defendants, in the village of New Rochelle. It was opposed by the defendants upon various grounds; but the only one we deem it necessary to discuss is that the plaintiff, as a foreign corporation, had received its only powers through a special act of the legislature of this state (Chapter 195 of the Laws of 1846) and that they were long since exhausted. The argument is made upon the proposition that, as a foreign corporation, it could acquire no right to condemn lands in this state, unless such right were expressly conferred by statute; and that it cannot avail itself of the powers given to corporations of this state by General Railway Acts. By the special act of 1846, the petitioning company (then the New York and New Haven R. R. Co.) were given "permission and authority * * * to continue and extend their railroad from the dividing lines of the states of New York and Connecticut, by such route as shall be established by said company, through the county of Westchester, to the New York and Harlem R. R. Co.'s line of road etc. etc." Provision was made for the location of its route, in such manner as should be approved by three commissioners, to be appointed by the governor. Power was given to purchase and hold such real estate, as might be necessary and convenient in accomplishing the objects of the act. It was authorized to construct a railroad, with one or more tracks, on the course designated by its directors and all essential powers were conferred to enable it to construct, maintain and to initiate its operation within this state.

It must, of course, be conceded that the provisions of the

special act would be ineffectual to authorize the condemnation of lands, not required for the precise purposes of the act and to carry it into effect, in the continuation of the petitioner's road between the points named in this state, and that they gave no power to acquire lands by condemnation proceedings after the railroad was constructed, as therein intended and provided for. At that time, and at all times prior to the adoption of the Constitution of 1846, railroad corporations were created by and derived their powers from special laws. Subsequently, pursuant to the authority with which the legislative body was invested by the Constitution adopted by the people in 1846, general railroad laws were enacted; with the object of placing the railroad companies within the state upon a footing of equality, as to their privileges and powers and as to their duties and liabilities. The general act of 1850 (Chap. 140 Session Laws 1850) endowed "all existing railroad corporations within this state" with all the powers and privileges and subjected them to all the duties and liabilities and provisions contained in the act; so far as they should be applicable to their charters. By that act authority was conferred upon railroads, organized under its provisions, to condemn lands for the construction of their roads; but that authority was broadened by subsequent legislation, so as to provide with respect to all existing corporations for the case where additional land might be required, after the construction of the railroad and for the purpose of operating it. Then, in 1892, (Chap. 565 Session Laws), was placed upon our statute books the present General Railroad Law; which, in its fourth section, gave power to "every railroad corporation" to acquire by condemnation such real estate as may be necessary for the construction, maintenance, or accommodation of its railroad. By the seventh section, "all real property, required by any railroad corporation for the purpose of its incorporation, shall be deemed to be required for a public use;" and the right is given to it to acquire title to the real estate required, by condemnation, "where it shall require any further rights to lands, or the use of lands for switches, turnouts etc. etc." It seems

very clear to us that under the law as it stood before the present General Railroad Act, as well as under it, the petitioner was included in the general gift of authority to acquire additional real estate; where, as is the case here, it was needed for its proper operation and to accommodate the road to the growth of its business and to meet the public demands of travel and traffic. The expressions "all existing corporations" in prior legislation and "any railroad corporation" in the present general law must be taken in their comprehensive sense; unless the legislature is inhibited by the fundamental law of the state from delegating to other than domestic corporations the power to exercise the right of eminent domain. An argument is based upon the supposed effect of the provisions of the General Railroad Law, as it was, or as it is, upon the charters of corporations, and upon the supposed conflict with the special act of 1846. We cannot find any such difficulty in bringing the foreign corporation, authorized to operate its road within this state, under the directions and restraints of this law. With respect to whatever rights it acquired, through the permission and authority given by the special act of 1846 to maintain and operate its road here, they were, necessarily, as much subject to subsequent legislation in their regulation, as were those acquired by the corporations of this state. There should, and can, be no question but that, except where the provisions of their charters come into material conflict, corporations, without discrimination as to their origin, lawfully exercising their franchises within this state, were dealt with in the General Railroad Law and brought under a uniform system of legal rules and procedure, in the conduct of their affairs and in the operation of their roads. But the question here is whether the legislature of the state could competently authorize foreign railroad corporations, as well as those organized under our laws, to acquire additional lands by condemnation. If it could, it must be deemed to have done so by this general law. There is nothing in the Constitution of the state, which limits the legislature in the exercise of the right of eminent

domain. Its dominion is as broad as the confines of the state and it may appropriate any part of the property within the state; subject only to the conditions that the appropriation shall be for a necessary public use and that reasonable compensation shall be made. There is no restraint upon its selection of a corporation created by the laws of another state, as an instrument to carry the appropriation to the public use into effect. (*Matter of Townsend*, 39 N. Y. at p. 175.) In the present case, the petitioner, under the special act of 1846, was authorized to carry on a part of its chartered business and to operate a portion of its road in this state. *Pro tanto*, it is settled here under the sanction of our laws and, to the extent of its existence and operation here, in the contemplation of those laws, it is, *pro hac vice*, a state corporation. (*Matter of Townsend*, *supra*.) The public interests were deemed to be promoted by permitting it to come within our borders and there to conduct its chartered business. That permission was an act which recognized its existence as a corporation in this state. Existing here as a corporation, the act, under which it exists, has neither exempted it from such general duties as apply to corporations generally within this state, nor precluded it from enjoying those general privileges which they enjoy, and which the public interests, in connection with the operation of a railroad, require that these *quasi* public agencies should possess. Those interests demand that the foreign corporation, operating its road here for their benefit, should have the same powers, as corporations organized here have, to acquire additional lands for the adequate transaction of the corporate business.

To hold otherwise would be, in our judgment, illogical and without sufficient warrant in the law. It is easy to show, from the reading of the various sections of the present General Railroad Law, that the intention of the legislature was to include every railroad corporation actually within the state, without discrimination. This the respondent's counsel has well pointed out in his brief. As one of the corporations referred to in the General Railroad Law, those provisions of

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the Code of Civil Procedure, which constitute the whole law of procedure upon the subject of condemnation, must govern in the proceedings to acquire the lands required by the company. The procedure of the special act of 1846 was limited to the precise accomplishment of the purpose of the act. With the construction of the road and its completion for operation, the provisions as to procedure ceased and became unavailable for the future acquisition of additional real estate. The power conferred by the General Railroad Law could only be exercised in accordance with the law of procedure, as enacted by the legislature to govern in all cases of the condemnation of real property for public use. (Section 3359, Code Civ. Pro.)

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

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THOMAS BUTLER, Respondent, v. THE MANHATTAN RAILWAY COMPANY, Appellant.

While, where a wrong has been done from which pecuniary injury has resulted, or when injury is the natural or probable result of the wrong, the injured party is not remediless, although the extent of the injury is not capable of precise proof, yet, when the damages claimed are neither the probable result of the wrong nor capable of proof, they cannot be awarded by a jury.

In an action by a husband to recover damages resulting from a personal injury to his wife, alleged to have been caused by defendant's negligence, the evidence tended to show that in consequence of the injury, the wife had a miscarriage. The court permitted the jury to consider and include in their verdict "any damages arising from the injury and resulting in depriving the plaintiff of prospective offspring." *Held*, error.

The injury to the wife was caused by the closing of the gate to the platform of one of defendant's cars, as she was seeking to enter the car. The wife testified to the injury, that the guard was looking another way, and that immediately after the injury she made an exclamation of pain. She was then permitted to testify to an insulting remark made by the guard in reply to her exclamation of pain. *Held*, error.

While, in such an action, proximity in time with the act causing the injury is essential to make what was said by a third person competent evi-

dence as part of the *res gestæ*, that alone is insufficient; to make it competent what was said must be part of the principal fact, and so part of the act itself; that is, naturally accompanying the act, or calculated to unfold its character and quality.

Butler v. M. R. Co. (4 Misc. Rep. 401), reversed.

(Argued October 23, 1894; decided October 30, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 5, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought to recover for the loss of services of plaintiff's wife, caused by injuries resulting from the alleged negligence of defendant.

The facts, so far as material, are stated in the opinion.

Edward B. Thomas for appellant. The court erred in allowing the plaintiff's wife to testify over objection and exception that the defendant's guard told her after the accident that she "could go to hell." (*Duche v. Wilson*, 37 Hun, 519; *Mayne on Dam.* 21, 22; *Sedg. on Dam.* §§ 437, 455; *Sherman v. D., etc., R. Co.*, 106 N. Y. 542; *Horner v. Everett*, 91 id. 641, 643; *People v. Davis*, 56 id. 95, 102; *Eighmy v. People*, 79 id. 546, 559; *Waterman v. Whitney*, 11 id. 157, 161; *Maine v. People*, 9 Hun, 111; *Waldele v. N. Y. & H. R. R. Co.*, 95 N. Y. 274; *Duby v. H. R. R. Co.*, 17 id. 131; *Ordway v. Sanders*, 58 N. H. 132; *D. & M. R. R. Co. v. Van Steinburgh*, 17 Mich. 99; *Commonwealth v. Hackett*, 2 Allen, 136; *Coleman v. People*, 58 N. Y. 561, 562; *Vandervoort v. Gould*, 36 id. 639, 644; *People v. Gonzales*, 35 id. 49, 59.) The court erred in instructing the jury that they could award the plaintiff damages for loss of prospective offspring and inability of his wife to bear children. (*Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 42; *Wilson v. Law*, 112 id. 536; *Story v. Brennan*, 15 id. 524; *McGowan v. Duff*, 14 Daly, 315; *Waltzheimer v. Lamont*, 9 N. Y. S. R. 437; *Darson v. City of Troy*, 49 Hun, 322; *Story v. Brennan*, 15 N. Y. 524.)

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The court erred in submitting to the jury the question of future damages, there being no evidence in the case that the injuries suffered by the plaintiff's wife were reasonably certain to be permanent. (*Ferguson v. Hubbell*, 97 N. Y. 507; *Elwood v. W. U. T. Co.*, 45 id. 554; *Curtis v. R. & S. R. Co.*, 18 id. 541; *Filer v. N. Y. C. R. R. Co.*, 49 id. 45; *Clark v. Brown*, 18 Wend. 229; *Lincoln v. S. & S. R. R. Co.*, 23 id. 425, 435; *Tozer v. N. Y. C. R. R. Co.*, 105 N. Y. 617; *McClaim v. B. C. R. R.*, 116 id. 467, 468; *Johnson v. M. R. Co.*, 52 Hun, 113; *Gregory v. N. Y., L. E. & W. R. Co.*, 55 id. 303; *Atkins v. M. R. Co.*, 57 id. 102.)

Gilbert D. Lamb for respondent. The testimony on behalf of plaintiff in respect to the assistance rendered plaintiff in his business by Mrs. Butler, and the value of her services, and the expenses to plaintiff arising from the accident was proper. (*Filer v. N. Y. C. & H. R. R. Co.*, 49 N. Y. 47; *Turner v. City of Newburgh*, 109 id. 30; *Blaechinska v. H. M. & H. for L. W.*, 130 id. 497; *Colwell v. M. R. Co.*, 64 Hun, 452; *Matteson v. R. R. Co.*, 35 N. Y. 493; *Gumb v. R. Co.*, 114 id. 411.) • The admission of testimony as to what Mrs. Butler did and said to the guard at the moment of the occurrence, and what the guard said in response at the same time, was proper. (1 Greenl. on Ev. § 108; *Enos v. Tuttle*, 1 Conn. 250; *Tilson v. Terwilliger*, 56 N. Y. 273; *Bagley v. Smith*, 10 id. 489; *Carpenter v. Stilwell*, 11 id. 61; *Keller v. R. R. Co.*, 24 How. Pr. 172; *Willets v. S. M. Ins. Co.*, 45 N. Y. 45; *Chisholm v. N. T. Co.*, 61 Barb. 363; *Shoemaker v. G. F. Ins. Co.*, 60 id. 84.)

ANDREWS, Ch. J. The evidence supports the claim that through the negligence of the guard in closing the gate to the platform of one of the defendant's cars, before the plaintiff's wife, who was seeking to enter the car, had got upon the platform, she was seriously injured, and that as one of the consequences of the injury she had a miscarriage a few days thereafter. Her pregnancy had then existed a few weeks.

The court permitted the jury to consider and to include in the verdict "any damages arising from the injury and resulting in depriving the plaintiff of prospective offspring." The charge on this point was expanded and repeated by the judge. The defendant excepted to this ruling. We think the exception was well taken, construing the charge most favorably to the plaintiff, that the court intended to confine the jury to a consideration of damage to the plaintiff from the loss of the chance of offspring involved in the particular miscarriage proved.

The action was for the loss of service of the wife. The term service in actions of this character includes any pecuniary injury suffered by the husband from having been deprived of the aid, comfort and society of his wife, or which reasonably may be expected to result in the future, including charges and expenses incurred, or which he may be put to in consequence of the wrong. (Cooley on Torts, p. 266 [226].) The wife has her own action for her physical injury, and for the pain and suffering to which she has been or will be subjected. The husband's action is for the consequences affecting his estate and for depriving him of the aid, society and companionship of his wife, which, except for the wrong, he might reasonably expect to enjoy. It is doubtless true that the raising of children is one of the objects of marriage. The husband may and usually does contemplate the birth of children as one of the important advantages of the marital relation. At common law and independently of statutory enactments, the death of a person caused by the negligence of another, gave no right of action for damages to any person, however closely connected with the deceased. But recent statutes, changing the rule of the common law, recognize the ties of kindred, the mutual dependence of parents and children, husband and wife, and of persons standing in other degrees of relationship, the reasonable expectations that pecuniary aid or assistance, even outside of legal obligations, will be extended by relatives to each other in case of necessity, and upon this basis have given a statutory action for the benefit of the widow and next

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of kin of a deceased person whose death was caused by the wrongful act, neglect or default of another against the wrongdoer, to recover the pecuniary damages, not exceeding a specified amount, resulting from such death, to the persons for whose benefit the action is given. (Chap. 450, Laws of 1847; chap. 256, Laws of 1849.) Under these statutes actions are allowed to be maintained for the death of infant children for the benefit of parents, and recoveries have been sustained, the basis of damage being the supposed pecuniary value to the parents of the life of the infant. (*Etherington v. R. R. Co.*, 88 N. Y. 641; *Birkett v. K. I. Co.*, 110 id. 504; *Houghkirk v. R. R. Co.*, 92 id. 219.) The difficulty of finding any safe basis upon which to estimate the pecuniary damages in such cases, has been frequently adverted to by the courts. Whether the infant would have lived to an age capable of rendering service, and whether the continued life would be a pecuniary benefit or burden, and the numerous contingencies which may affect the value of the life make the ascertainment of such value by a jury, in a great degree, a matter of speculation and conjecture. But where the inquiry relates to the value of the life of a child cut off in infancy, there are some material facts capable of proof, which may be placed before the jury and which afford some aid in estimating the pecuniary loss suffered by parents or other relatives. The age and sex of the infant may be proved, its mental and physical condition, its bodily strength, and generally whether there was the apparent promise of a continued or useful life, or the contrary. The speculation which, in the present case, the jury were permitted to make had not even these safeguards, slight as they are. They were allowed to estimate the pecuniary interest which a husband had in the chance that an embryo, not yet quickened into life, would become a living child. The sex could not be known, and if born alive, the infant might have been destitute of some faculty, or so physically infirm as to have made it a helpless charge. There are no elements whatever upon which a jury could base any conclusion that a pecuniary injury had been suffered by the

plaintiff from the loss of the unborn child, and this inquiry should have been excluded from the consideration of the jury as too remote and speculative to form an element in the recovery. Where a wrong had been done from which pecuniary injury has resulted, or where injury is the natural or probable result of a wrong, the injured party is not remediless, although the extent of the injury is not capable of precise proof. The jury in such a case may fix the damages within reasonable limits, as best they may. Actions for defamation or involving recovery for pain or suffering are examples. But where damages claimed are neither the probable result of the wrong nor capable of proof, they cannot be awarded by the jury. It is not in the interest of justice to extend the field of speculation in jury trials beyond its present limits, and to sustain the ruling in this case would go beyond what has been hitherto sanctioned by the courts.

We think there was error also in one of the rulings upon the admission of evidence. The plaintiff's wife testified to the closing of the gate and the blow received, and stated that at the time the guard was looking in the opposite direction; that immediately after the blow she made an exclamation of pain. The plaintiff's counsel then asked the witness "what the guard said in reply to her exclamation of pain." The question was objected to by the counsel for the defendant as incompetent and hearsay, whereupon the plaintiff's counsel said: "I intend to prove that the brakeman in charge of the brakes at the moment of the blow did not treat her (the plaintiff's wife) with respect, but, on the contrary, insulted her." The trial judge, after warning the plaintiff's counsel, finally allowed the question to be put, and the witness answered: "He said, I can go to hell. Shut up." The defendant's counsel excepted to the evidence. The only claim made in support of the ruling of the court is that the remark of the brakeman was part of the *res gestæ*. We think the ruling cannot be supported on this ground. The only circumstance upon which it can be claimed to have been part of the *res gestæ* was its connection in point of time with the transaction

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under investigation, viz., the alleged injury from the closing of the gate. While proximity in point of time with the act causing the injury is in every case of this kind essential to make what was said by a third person, competent evidence against another as part of the *res gestæ*, that alone is insufficient, unless what was said may be considered part of the principal fact, and so a part of the act itself. But as in this case the act was complete before the remark of the brakeman was made, although closely connected with it in point of time, and was not one naturally accompanying the act, or calculated to unfold its character or quality, it was not admissible as *res gestæ*. It was as independent of the principal fact, and as incompetent as evidence as though the act and the remark had been much further separated in point of time. *Res gestæ* in a case like this implies substantial coincidence in time, but if declarations of third persons are not in their nature a part of the fact, they are not admissible in evidence, however closely related in point of time. (See *Waldele's Case*, 95 N. Y. 274, and cases cited.) The remark of the brakeman was brutal and for that reason was calculated to prejudice the jury, but it had nothing to do with the question at issue, viz., whether the plaintiff's wife sustained an injury through the defendant's negligence, and having been admitted against the protest of the defendant's counsel, its admission was reversible error.

Upon both grounds stated, the judgment should be reversed and a new trial granted.

All concur, except BARTLETT, J., not voting.

Judgment reversed.

HENRY J. BRIDGER, Respondent, v. JONAS G. GOLDSMITH,
Appellant.

A seal unnecessarily affixed to a contract for the sale of personal property cannot affect the rights of the parties, and every defense is open to either which would exist had the writing not been sealed.

A mere device of one party to a contract intended to shield him from the results of his own fraud practiced upon the other party cannot be the basis of an equitable estoppel.

So, also, where one party to a contract has perpetrated a fraud upon the other by means of which the latter was induced to enter into the contract, he cannot be precluded from seeking redress by a provision in the contract purporting to grant to the former immunity against the consequences of any fraud.

Defendant sold to plaintiff his business, the fixtures and other property in his store. The contract of sale was in writing, under seal and contained a clause to the effect that it was understood and agreed that defendant had made no statements or representations for the purpose of inducing the sale, other than that he had been engaged in the business since 1867. In an action to set aside the sale and recover the consideration paid on the ground that plaintiff was induced to purchase by false and fraudulent representations as to the character of the property, the extent of the business and the income derived therefrom, it appeared that after the negotiations had been completed and the agreement drawn, the clause specified was inserted at the request of defendant. *Held*, that the provision was not a covenant but simply a statement in the nature of a certificate as to a fact; and that plaintiff was not precluded thereby from showing the fraud and obtaining relief therefrom.

Reported below, 8 Misc. Rep. 585.

(Argued October 17, 1894; decided October 30, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made the first Monday of March, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This was an action upon a contract, the material provisions of which, and the facts, so far as material, are stated in the opinion.

Isaac H. Maynard for appellant. The plaintiff cannot maintain this action because of the covenant or agreement

which he made under seal, that the defendant had not in any manner or form stated, made or represented to him; for the purpose of inducing the sale of the business or the making of the agreement, any statements or representations, verbally or in writing, in respect to the business, other than that the defendant had been engaged in the piano business in the city of New York since 1867. (*Parish v. U. S.*, 8 Wall. 489; *Rawdon v. Toby*, 2 How. [U. S.] 493; *Sawyer v. Prickett*, 19 Wall. 146; *Sedgwick v. Stanton*, 14 N. Y. 289; *Bleakley v. Sullivan*, 140 id. 181; Penal Code, § 554; *Baglehole v. Waters*, 3 Camp. 156.) There is no proof to sustain the finding that the plaintiff was deceived and misled into the execution of the covenant contained in paragraph four of the agreement of sale. (*Lyon v. Richmond*, 2 Johns. Ch. 51.)

John A. Straley for respondent. The bill of sale does not estop respondent from asserting the fraud of appellant. (*Wilcox v. Howell*, 44 N. Y. 398; *U. V. Co. v. Skinner*, 64 Hun, 293; *Broom's Leg. Max.* 622; *Shapley v. Abbott*, 42 N. Y. 443; *Crawford v. Lockwood*, 9 How. Pr. 547; *Kneetle v. Newcomb*, 31 Barb. 169; 22 N. Y. 249; *Smyth v. Munroe*, 84 id. 361; *Steel v. Smelting Co.*, 106 U. S. 447; *Bell v. Leggatt*, 7 N. Y. 176-179; *W. C. Co. v. Hathaway*, 8 Wend. 483; *Kuhl v. Mayor, etc.*, 23 N. J. Eq. 84; *Bigelow on Est.* [4th ed.] 563; *Dickerson v. Colgrove*, 100 U. S. 578; *Boyce v. Watrous*, 73 N. Y. 597.) Appellant's knowledge that the representations contained in the fourth clause were not true prevents his invoking it by way of estoppel. (*Bigelow on Est.* [4th ed.] 480, 563; *Wilcox v. Howell*, 44 N. Y. 398; *Holden v. P. Ins. Co.*, 46 id. 1; *Stanford v. Lyon*, 37 N. J. Eq. 94; *Blair v. Wait*, 69 N. Y. 113; *Steel v. S. Co.*, 106 U. S. 447; *Fitzpatrick v. Flanagan*, Id. 648.) As a contract, paragraph four of the bill of sale is void as against public policy. (*Cullen v. Butter*, 5 M. & S. 466; *U. F. Co. v. Skinner*, 64 Hun, 293; *Shapley v. Abbott*, 42 N. Y. 443; *Crawford v. Lockwood*, 9 How. Pr. 547; *Kneetle v. Newcomb*, 22 N. Y. 249; *Bell v. Leggatt*, 8 id. 176; *Sedgwick v.*

Stanton, 14 id. 289.) The fraudulent suppressions of fact not covered by the fourth clause of the bill of sale would warrant the relief granted respondent. (Story Eq. Juris. 207; 2 Kent's Comm. 482; *Paul v. Hadley*, 23 Barb. 521; 3 Wait's Act. & Def. 431; *Simar v. Canaday*, 53 N. Y. 298; Pom. Eq. Juris. §§ 900, 901, 904; *Brown v. Montgomery*, 20 N. Y. 287; *Nickley v. Thomas*, 22 Barb. 652; *Bench v. Sheldon*, 14 id. 66.)

O'BRIEN, J. The judgment in this case awards equitable relief to the plaintiff, rescinding and declaring void for fraud a written contract made by the parties on the 16th day of March, 1891. By this contract the defendant sold to the plaintiff for \$3,000 his business, fixtures and other property, including three upright pianos in his store or place of business in the city of New York. The plaintiff went into the possession of the store and the goods, having paid \$2,500 of the purchase price, and soon after ascertained that he had been induced to enter into the contract and make the payment by means of grossly false and fraudulent representations as to the character and value of the property and the extent and magnitude of the business which the defendant transferred to him and the income therefrom. The fraudulent acts and representations of the defendant which induced the plaintiff to purchase and pay for the property are fully alleged in the complaint, and found by the court upon evidence entirely sufficient. In view of these findings we must assume, upon the consideration of the appeal, that the defendant in negotiating the sale deceived and defrauded the plaintiff. The judgment annulled the contract and directed the defendant to restore to the plaintiff the portion of the purchase price which was paid. In this state of the case there would be no question for our consideration, except for a peculiar clause which was inserted in the written instrument, which is the evidence of the terms and conditions of the sale, at the request and upon the suggestion of the defendant. That clause reads as follows: "It is expressly understood and agreed between the

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parties hereto that the said party of the first part has not, in any manner or form stated, made or represented to the said party of the second part, for the purpose of inducing the sale of the said business or the making of this agreement, any statements or representations, verbally or in writing, in respect to the said business other than that the said party of the first part has been engaged in the piano business in the city of New York since 1867."

It is urged by the learned counsel for the defendant that, as this stipulation was inserted in the writing, which is under seal and assented to by both parties, the action cannot be maintained. I assume that the fact that a seal was unnecessarily affixed to an agreement for the sale of personal property cannot affect the rights of the parties. Every defense is open to either party that would have existed in case the writing was unsealed. It appears that after the negotiations had been completed and the agreement drawn, the defendant stated, in the presence of the plaintiff, and the counsel for both parties present, that he wanted a clause of this character inserted. The plaintiff's counsel at first objected to it. The defendant's counsel suggested that it would make no difference, and the plaintiff consented that it might be put in. There is evidence in the case tending to show that the plaintiff voluntarily assented to this stipulation after having been advised by his counsel that it would have the effect of precluding him from subsequently alleging fraud in the transaction, even though it existed in fact. This provision is not a covenant in any proper sense of that term. Indeed, it can scarcely be considered as any part of the agreement at all. It does not relate in any manner to the subject-matter of the contract. It was a mere statement in the nature of a certificate as to a fact. It did not relate to the property or to the terms of the sale or the payments, but to the absence of all fraud from the transaction. The clause cannot be given any greater effect than if it had been written upon a separate paper after the execution of the contract and signed by the parties. The question now is whether it can be given the effect claimed for it by the

learned counsel for the defendant, to preclude the plaintiff from alleging fraud in the sale and pursuing in the courts the remedies which the law gives in such cases. It cannot operate by way of estoppel for the obvious reason that the statements were false to the defendant's knowledge. He may, indeed, have relied upon its force and efficacy to protect him from the consequences of his own fraud, but he certainly could not have relied upon the truth of any statement in it. A mere device of the guilty party to a contract intended to shield himself from the results of his own fraud, practiced upon the other party, cannot well be elevated to the dignity and importance of an equitable estoppel. If the clause has any effect whatever, it must be as a promise or agreement on the part of the plaintiff, that however grossly he may have been deceived and defrauded by the defendant, he would never allege it against the transaction or complain of it, but would forever after hold his peace. It is difficult to conceive that such a clause could ever be suggested by a party to a contract, unless there was in his own mind at least a lingering doubt as to the honesty and integrity of his conduct. I assume that there is no authority that we are required to follow in support of the proposition that a party who has perpetrated a fraud upon his neighbor may, nevertheless, contract with him in the very instrument by means of which it was perpetrated, for immunity against its consequences, close his mouth from complaining of it and bind him never to seek redress. Public policy and morality are both ignored if such an agreement can be given effect in a court of justice. The maxim that fraud vitiates every transaction would no longer be the rule but the exception. It could be applied then only in such cases as the guilty party neglected to protect himself from his fraud by means of such a stipulation. Such a principle would in a short time break down every barrier which the law has erected against fraudulent dealing. It is argued that whatever may be said about the fraudulent character of the sale itself, this particular clause was a bargain fairly made and deliberately entered into by the plaintiff, with

full knowledge of its purpose, scope and effect, and, therefore, the plaintiff should be held to abide by it. But it is not correct to say that even with respect to this clause the parties dealt with each other at arms length. The defendant, when suggesting it, had the advantage of his secret knowledge, that its statements were false, while the plaintiff, on the other hand, relying upon the truth of the representations made as to the extent and character of the business, was not upon his guard, but, assuming that the defendant had told him the truth, was readily induced to sign a statement which, upon such assumption, was obviously of no consequence. In fact it was but a link in the chain and the crowning act which was to secure to the defendant the full fruits of the fraud and thus enable him not only to overreach the plaintiff, but the law itself. This clause cannot be separated from the transaction in which it originated. It is tainted with the same vice and must share the same condemnation. As the chain can be no stronger than its weakest link, so this clause cannot be made to survive the rest of the transaction as a shield and protection to the defendant. I have not thought it necessary to cite authorities in support of these views, but cases are not wanting which by analogy, at least, sustain them, and by an application of the principles decided to the facts here, the foregoing propositions are legitimately deduced. (*Wilcox v. Howell*, 44 N. Y. 398; *Shapley v. Abbott*, 42 id. 443; *Hutchins v. Hebbard*, 34 id. 24; *Universal Fashion Co. v. Skinner*, 64 Hun, 293; *Crawford v. Lockwood*, 9 How. Pr. 547; *Kneetle v. Newcomb*, 22 N. Y. 249; Broom's Legal Maxims, 622; Bigelow on Est. [4th ed.] 563; *Smyth v. Munroe*, 84 N. Y. 361; *State v. Smelting Co.*, 106 U. S. 447.)

Much of the argument in support of the appeal rests upon the proposition that the defendant would not have assented to the sale without this clause, and as the plaintiff obtained such assent only by acquiescing in its insertion in the writing, he ought not now to be permitted to question it. Without inquiring what the result would or ought to be in case this assumption was correct, it is sufficient to observe that no such

fact is found, and in the sense in which the defendant claims, it could not have been found from the testimony. While at the end of the transaction he did suggest that the clause should be inserted, and perhaps insisted upon it, yet to say that he would not have made the sale under the same circumstances without it, had the plaintiff refused his assent, is to assert a proposition that finds no support in the facts and circumstances of the case. No doubt the defendant wanted this provision in the contract, but the terms and conditions of the sale had been settled before it was suggested, and it was manifestly intended as a possible safeguard against the result of misrepresentation rather than a *bona fide* condition of the sale.

The judgment is right and should be affirmed, with costs.
All concur.

Judgment affirmed. _____

FRANK S. OAKES, Appellant, v. THE CATTARAUGUS WATER
COMPANY, Respondent.

Where the president of a private corporation has full personal charge of its business, he represents the corporation, and *prima facie* has power to do any act which its directors could authorize or ratify.

It seems, where the business of a private corporation or an individual is threatened with competition, a contract with the competitor that he shall abandon his enterprise and take employment at an agreed compensation, with such corporation or individual, is not against public policy.

C., who was engaged in organizing a water works company, and was the principal promoter of the enterprise, in the name of the proposed corporation entered into a contract with plaintiff, agreeing to pay him \$1,000 for his services "for securing right of way, hydrant rental, placing investments, and in all things pertaining to the building of water works." The company was thereafter incorporated; C., his wife and brother became respectively president, secretary and treasurer thereof; C. was its general managing agent and had full direction and charge of its business. The water works were constructed, and plaintiff, at the request of C., rendered services of the character called for by the contract. In an action against the corporation on the contract it appeared that, after the completion of the works, C. acknowledged the indebtedness to plaintiff and promised to pay it. *Held* (FINCH, and GRAY, JJ., dissenting), that while the contract, having been made before defendant had a corporate existence, was not, at the

inception thereof, its contract or binding upon it, yet it was of such character that C. had the power to make or ratify it on behalf of the corporation when it attained a legal existence; that if C. intended, by calling upon plaintiff to do the things agreed to in the writing, to adopt and ratify the agreement on behalf of the defendant, and if plaintiff intended to and did perform for the corporation, it became bound; that these were, under the circumstances, questions of fact for the jury; and so, that an order dismissing the complaint on trial was error.

Evidence was given on the trial tending to show that plaintiff, before contracting with C., contemplated the formation of a similar corporation himself, and that one purpose of the agreement was to compensate him for consenting to abandon the enterprise. No such consideration was stated in the agreement. *Held*, that the court was not warranted in holding, as matter of law, that the purpose of the contract was forbidden by public policy, or that it was made for purposes other than that stated upon its face.

(Argued June 21, 1894; decided November 2, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 18, 1893, which denied a motion by plaintiff for a new trial and ordered judgment in favor of defendant upon a decision of the court on trial at Circuit non-suiting the plaintiff.

This action was brought upon the following agreement:

"CATTARAUGUS, N. Y., *Feb.* 18, 1890.

"This agreement made by and between the Cattaraugus Water Company of Cattaraugus, N. Y., and F. S. Oakes, of the same place, Witnesseth: The Cattaraugus Water Company hereby agrees to and with F. S. Oakes to pay him the sum of One Thousand Dollars in consideration of his services to said Water Company in securing right of way, hydrant rental and placing investments, and in all things pertaining to the building of water works at Cattaraugus, N. Y.

"Said sum to be paid at the completion of said works.

"Said services to consist of aiding and helping the said company in the above matters, but without cash expense to said Oakes.

"If said water works are not constructed in Cattaraugus by said company, then this agreement to be null and of no effect.

"This agreement shall be binding on the successors and assigns of the said company.

"GEORGE N. COWAN,

"Att'y for Cattaraugus Water Co.

"F. S. OAKES."

The facts, so far as material, are stated in the opinion.

William H. Henderson for appellant. Upon the facts as the jury were authorized to find them, George N. Cowan, as the president and the chief managing officer of the defendant in constructing the water works for the defendant at the village of Cattaraugus in the summer and fall of 1890, stood in the place of the corporation, and his acts and admissions while so engaged in the duties of his office were the acts and admissions of the defendant itself. (*Jourdan v. L. I. R. R. Co.*, 115 N. Y. 380.) The defendant having had, through the action of its chief managing officer, the entire benefit of the performance of the contract on the part of the plaintiff, must be considered as having ratified all its terms, and the defendant must be presumed by such ratification to have agreed to all the provisions thereof, and to have become obligated to pay to the plaintiff the sum sued for. (*Jourdan v. L. I. R. R. Co.*, 115 N. Y. 380, 385; *Scott v. M., etc., R. R. Co.*, 86 id. 200; *Beers v. P. G. Co.*, 14 Barb. 358; *Wild v. N. Y., etc., M. Co.*, 59 N. Y. 644; *Decker v. G., etc., Co.*, 61 Hun, 516; *Hoag v. Lamont*, 60 N. Y. 96, 101; *Bommer v. S. S. Co.*, 81 id. 468.) George N. Cowan being the general agent and as such in the actual charge of the business of the defendant in constructing the water works, and being the chief officer of the directors, the directors of the defendant must be presumed to have had knowledge of all his acts and doings, and must be presumed, in the absence of any evidence to the contrary, to have assented thereto. (Story on Agency, § 140; *Hyatt v. Clark*, 118 N. Y. 563, 569; *Adams v. Mills*, 60 id. 533, 539; *Woodruff v. E. R. Co.*, 93 id. 609; *S. H. Co. v. E. H. B. Co.*, 90 id. 607.) Upon the whole case, the plaintiff was

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entitled to submit the evidence to the jury. (*Haman v. Jordan*, 129 N. Y. 61.) The claim of the defendant that the contract sued upon is void and illegal as being against public policy, is destitute of merit. (*D. M. Co. v. Roeber*, 106 N. Y. 473; *Leslie v. Lorillard*, 110 id. 519; *Tode v. Gross*, 127 id. 480; *W. T. Co. v. Poole*, 51 Hun, 157; *Cameron v. N. Y. & M. V. W. Co.*, 62 id. 269.)

D. E. Powell for respondent. This contract comes within the rule rendering it void on the ground of public policy. (*People v. N. R., etc., Co.*, 22 Abb. [N. C.] 164; *Wilber v. N. Y. C. Co.*, 35 N. Y. S. R. 81; *Atcheson v. Mallon*, 43 N. Y. 147; *Mills v. Mills*, 40 id. 543; *Gray v. Hook*, 4 id. 449; *Pease v. Wolsh*, 49 How. Pr. 269; *People v. Lord*, 6 Hun, 390; *State v. Hartford, etc.*, 29 Conn. 538; *Judd v. Harrison*, 46 N. Y. S. R. 925; *Brisbone v. Adams*, 3 N. Y. 129; *Bracket v. Wyman*, 48 id. 667; *People v. Stevens*, 71 id. 527; *Rose v. Truax*, 21 Barb. 361; *Davison v. Seymour*, 1 Bosw. 88.) Had the agreement been valid the plaintiff could not recover as the contract would have been entire, and full performance on his part would be a condition precedent to recovery. (*Monell v. Burns*, 4 Den. 121; *Reab v. Moore*, 19 Johns. 337; *Wolf v. Howes*, 20 N. Y. 197.) A contract to prevent rivalry or competition is not within the scope of defendant's charter, and no officer can make such a contract or bind the corporation by ratification or otherwise, and a person dealing with a corporation is chargeable with notice of its power, and the purposes for which it was formed, and when dealing with its agents or officers is bound to know the extent of their power and authority. (*Alexander v. Cauldwell*, 83 N. Y. 480; *Jemison v. C. S. Bank*, 122 N. Y. 135; *Milbank v. N. Y., L. E., etc., R. R. Co.*, 64 How. Pr. 401.) There is no proof that any person, when an officer, ever saw or knew that plaintiff was performing the slight services that he claims to have rendered; and if they had, plaintiff could not recover their value, for there is no proof establishing it, and that is not the cause of action claimed in the complaint. The action

is based upon the written contract, and the General Term was right in so holding. (*Foley v. Speer*, 100 N. Y. 552; *Harrington v. F. N. Bank*, 1 T. & C. 361; *Nixon v. Palmer*, 8 N. Y. 398; *Fisher v. Murdock*, 13 Hun, 487.) The declarations of the individual members of the company offered by the plaintiff were not competent. (*Jex v. Board of Education*, 1 Hun, 157; *Alexander v. Cauldwell*, 83 N. Y. 480; *N. F. S. B. Co. v. Buchanan*, 66 id. 261; *Custer v. T. G. Co.*, 63 Penn. St. 381; *B. Church v. B. F. Ins. Co.*, 28 N. Y. 153; *Justh v. N. Bank*, 4 J. & S. 273; *Happock v. Moses*, 43 How. Pr. 201; *F. N. Bank v. O. N. Bank*, 60 N. Y. 278; *Taylor v. S. Ave. R. R. Co.*, 27 J. & S. 513; *Woods v. Franklin*, 46 N. Y. S. R. 396; *Jackson v. Sandman*, Id. 633; *M. N. Bank v. Clark*, 139 N. Y. 314; *Thalhimer v. Brinkerhoff*, 4 Wend. 394; *Fogg v. Child*, 13 Barb. 296; *Budlong v. Van Nostrand*, 24 Barb. 25; *Islee v. Tucker*, 5 Duer, 593.)

O'BRIEN, J. The trial court non-suited the plaintiff, and the principal question presented by the appeal is whether there was proof made which should have been submitted to the jury. The plaintiff made a request to that effect, which was denied and an exception taken. The defendant is a corporation organized under the provisions of chapter 737 of the Laws of 1873 and the acts amendatory thereof and supplementary thereto for the purpose of supplying the village of Cattaraugus with water. The certificate of incorporation was executed on the 3d day of March, 1890, but not filed in the proper office until the 19th day of May following, at which date, it is assumed on both sides, that the defendant's corporate existence begun. The statute requires the consent of the town authorities of the town where the operations of the corporation are to be carried on as a preliminary condition of its creation, and this was procured by the parties promoting the organization of the defendant on the 22d day of February, 1890. The application for this consent was in writing, signed by the seven persons who afterwards became the incorporators,

and bears date February 5, 1890, and proves that at that date, if not before, they intended, in case the application was granted, to form the corporation. One George N. Cowan, an attorney at law, seems to have been the principal promoter of the whole enterprise. His name appears first upon the written application to the town authorities for the consent, and in the certificate of incorporation, and is followed by that of his wife and brother with four other persons. Upon the organization of the defendant he and his wife and brother became respectively the president, secretary and treasurer of the corporation. This action was brought by the plaintiff to recover the sum of \$1,000 upon a written agreement bearing date February 18, 1890, signed by the plaintiff and by Cowan as attorney for the defendant. The plaintiff's difficulty in the case arises from the fact that this paper was executed, as will be seen from the dates, before the defendant had any corporate existence, and, therefore, in its inception, it was not the defendant's contract or binding upon it in any form. By the terms of the instrument the defendant agrees to pay to the plaintiff the sum of one thousand dollars for his services to defendant in securing right of way, hydrant rental and placing investments and doing things pertaining to the construction of the water works for the village, to be paid at the completion of the work. It was further stated that unless the defendant constructed the works the agreement was to be considered and treated as null and void, but if it did construct then the plaintiff's services for which the compensation was to be paid should consist in aiding and helping the defendant in the matters above specified without cash expense to him. It was shown at the trial that the defendant in its corporate capacity did construct and complete a system of water works for the village. The work was commenced about June, 1890, and completed before the commencement of this action. The defendant established an office in the village and retained it while the work was in progress. Cowan was the president and manager of the business and had full direction and charge, his wife acting as secretary and his brother as treasurer of the

corporation. The plaintiff, upon the request of Cowan, the president, performed services for the defendant of the kind and character described in the contract above mentioned. They do not appear to have been of a very important character and no proof was given in regard to their value, but, so far as appears, he performed all that was required of him. After the completion of the water works Cowan on several occasions acknowledged the indebtedness to the plaintiff and promised to pay it. There is no proof in the record tending to show that the general powers possessed by Cowan as the president of the defendant were limited or restricted by by-laws or in any other way, and we must assume that he had all the power that the president and general managing agent of such a corporation could exercise in the transaction of the corporate business at the place where its operations were being conducted. The general powers of such an officer may be limited or restricted by the charter or by-laws of the corporation. These restrictions may not be binding on all persons dealing with the corporation under all circumstances, as secret and unknown instructions to a general agent of a natural person do not always bind persons dealing with the agent in ignorance of such instructions and relying on what appears to be his actual powers. In this case the president, having full personal charge of the business which the defendant was organized to transact, represented the corporation, and *prima facie* he had power to do any act which the directors could authorize or ratify. (*Hastings v. Brooklyn Life Ins. Co.*, 138 N. Y. 473; *Conover v. Ins. Co.*, 1 id. 290; *Booth v. F. & M. N. Bank*, 50 id. 396; *Leslie v. Lorillard*, 110 id. 519; *Holmes v. Willard*, 125 id. 75; *Patterson v. Robinson*, 116 id. 193; *Rathbun v. Snow*, 123 id. 343; *N. Y. & P. & B. R. R. Co. v. Dixon*, 114 id. 80; *Morawetz on Corporations*, §§ 251-253.) There can be no doubt, I think, that the contract which is the basis of this action was of such a character and the objects expressed upon its face were of such a nature that the president and general manager of the enterprise had the power to make it in behalf of the corporation whenever it attained a legal existence. The

corporation had resolved to do the work, which was put in charge of the president, who was the principal promoter in organizing it. He was on the ground directing the operations and must be assumed to have the power to do whatever was necessary in executing the corporate objects. It cannot be doubted that he had power to employ engineers and workmen to construct the works and to bind the company by contracts for labor and materials. He could also employ men to secure for the company rights of way, rentals for hydrants and the other things necessarily pertaining to the business, and if he could make contracts for that purpose, why could he not adopt and ratify one made by himself, though before the corporation was legally created, but in anticipation of what subsequently occurred in obtaining the consents and filing the certificate of incorporation? We think this was fairly within his general powers, and if he intended, in behalf of the corporation which he represented, by calling upon the plaintiff to do the things which he had agreed to do in the writing, to adopt and ratify the agreement made before the incorporation, instead of making a new one, and the plaintiff intended to and did perform for the corporation the things specified in the agreement, there is no good reason why the corporation did not become bound by his action. Whether this was the intention and purpose of the president of the defendant and of the plaintiff was, under the circumstances of the case, a question of fact which should have been submitted to the jury. Ratification or adoption, which in this case mean the same thing, is largely a question of intention to be determined from facts and circumstances as one of fact, and the court was not warranted, under the circumstances, in disposing of the question as one of law.

But it is insisted that the contract, even if regarded as the corporate obligation, is void as against public policy. There was proof given at the trial tending to show that the plaintiff, before entering into the contract with Cowan, contemplated an application in his own name to the town authorities for permission to form a corporation to construct the works, and that

the purpose of the agreement was to compensate him for consenting to abandon the enterprise and allow the defendant to obtain the consent and reap the benefit of the enterprise. It is alleged in the complaint that at the time of entering into the agreement it was understood and agreed between the parties that in addition to the consideration mentioned in the writing for the payment of the one thousand dollars, the plaintiff was not to prosecute or carry on the business for which the defendant was subsequently organized, and was not to organize any corporation for that purpose, or to ask or receive a franchise from the town authorities for that purpose. It was further alleged that the plaintiff kept and performed these conditions, which were not expressed in the writing, but fully understood between the parties, but did assist Cowan in his efforts to accomplish the purpose originally contemplated by the plaintiff. These allegations are, however, put in issue by the answer. The proof would have justified a finding by the jury that the plaintiff's promise to abandon the enterprise and leave the field open to Cowan and his associates was an element that entered into the contract, and an inducement to its execution. No such purpose, however, appears upon the face of the contract. The consideration there expressed for the payment of the money was services which the plaintiff could lawfully perform, and which it is claimed he did perform, for the defendant. The court was not warranted in holding, as matter of law, that the purpose of the contract was forbidden by public policy, or that it was made for a purpose other than that stated upon its face. If that question was in the case at all it was one for the jury, as the evidence was not conclusive but open to different inferences. But we think that this agreement, upon any view of the facts, does not come within that class of contracts which are forbidden or are held void on grounds of morality or public policy. There was no purpose to suppress competition or bidding at any public sale or letting of a contract for public purposes or in restraint of trade or to influence the action of public officials. Assuming that both the plaintiff and Cowan intended to apply

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for the franchise, and that the latter persuaded the former to abandon his purpose and aid him in the manner mentioned in the contract for the consideration promised, there was nothing immoral or that threatened the public interests or the public good in such an arrangement. If the business of a private individual or corporation is threatened with competition it is not illegal or immoral if one can persuade his competitor to abandon an enterprise in which both cannot succeed, and take employment with the one remaining in the business at a stated compensation. Such an agreement fairly entered into is legitimate business. If the parties in this case deemed it for the interest of both that only one application should be made for a franchise that could be granted to but one of them, the arrangement does not, as I conceive, violate any settled rule or principle of public policy. (*Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Leslie v. Lorillard*, 110 id. 519; *Tode v. Gross*, 127 id. 480; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157; *Cameron v. N. Y. & Mt. Vernon Water Co.*, 62 id. 269.)

For these reasons the judgment should be reversed and a new trial granted, costs to abide the event.

GRAY, J. (dissenting). If, at the time the agreement set forth in the complaint was made, there had been such a corporation as the Cattaraugus Water Company, then it would be quite conceivable that there might be a ratification by it of the act of a person standing in the relation to it of an officer or agent. Ratification presupposes the doing of an act by an agent, which a principal could have authorized. It is defined as an agreement to adopt an act performed for us by another and is equivalent to an original authority to do the thing in question. But, here, Cowan represented no one but himself. He and others were proposing to associate themselves in a corporate project. He was a mere promoter and he had no principal. When the plaintiff entered into the agreement with Cowan, he was bound to inform himself as to whether the latter represented an actual principal. If he neglected to do so, his

agreement was worthless; except so far as it imposed upon Cowan, individually, a liability for undertaking to act with no responsible principal behind him. (Dunlap's Paley on Agency, *374.) We may assume that there was sufficient evidence upon which a jury might have found that there was ratification, if there had been a contract made for the company; but it ought to be perfectly manifest that, unless there had been *in esse* a corporation, *de-facto* or *de-jure*, which could have made Cowan its attorney or agent, there could not be such a thing as a ratification. The rule is stated in Morawetz on Private Corporations (section 547) as follows, viz.: "A corporation is not responsible for acts performed, or contracts entered into, before it came into existence, by promoters or other persons, assuming to bind the company in advance." Again, at section 549, the author says, that "a corporation cannot be charged with the acts or contracts of its promoters, by virtue of the technical doctrine of ratification. This doctrine applies only to acts performed on behalf of an existing principal." These statements are amply borne out by the authorities cited by the author, and are founded in clear reason. (And see *Caledonian etc. R. Co. v. Helensburgh*, 2 Macq. H. L. Cas. 391, 409.) There may, however, be an adoption of agreements made by promoters of companies by a formal acceptance; or, if it is a case where the members of the corporation would be chargeable with knowledge of the contract, and had knowingly received the benefit of an engagement entered into by promoters, adoption might be implied. The adoption of such an agreement by a corporation is equivalent, of course, to the creation of a new agreement and is governed by all the rules applicable to the formation of a contract under the common law. (1 Morawetz Corps. sec. 549.) I am unable to believe, and I know of no authority for holding, that adoption, in such a case, of a written contract could rest in implication from the mere statements or acts of the interested party who made it, with no evidence to show any knowledge or acquiescence on the part of any other officer or member of the corporation. I think the other view would be a most hazardous one to take, for the interests of shareholders in corporations.

Assuming that a corporation may become obligated by a contract, made for it before its incorporation, through acceptance or adoption, it should at least appear, in order to justify a verdict from the facts, that those facts established a knowledge by its agents of its existence and of its terms; or that the benefits, the acceptance of which is relied upon to constitute adoption, were of that nature as to presuppose and to charge the company or its agents with knowledge of a contract with the person from whom derived.

In this case it is not proved that there was any formal or official action upon the agreement; or that any of the directors knew of such, outside of Cowan himself. There was nothing which amounted to a representation by the defendant to plaintiff that the contract was subsisting and valid. (*Wilson v. West Hartlepool R. Co.*, 2 De G., J. & S. 491.) There may have been sufficient evidence in the case to warrant the submission to a jury of the question whether the defendant had not, through its chief officer and manager, become liable to pay plaintiff the value of his services; as the evidence might exhibit that value to be. But this is not such an action. The plaintiff rests his action solely upon the obligation, which the agreement set forth imposed upon the defendant, and if, as it is conceded, there could have been none imposed at the time, it could never have become one, in the absence of an adoption of the agreement. As I have said, this agreement, so far as the record discloses, was never brought to the knowledge of any of the directors, or of the members of the corporation, and it is not at all easy to see what services the plaintiff actually did under it, before or after the company was formed, which could possibly have led any one to suppose that he was under a contract with it, of the nature of the one in question, or of any other nature. We assume, however, that there were services rendered to and accepted by the defendant; but we hold that they were to be recovered for according to their value and that the contract produced by the plaintiff never became the agreement of the company, so as to obligate

it, absolutely and in all events, to pay him the sum stated therein, upon the completion of the water works.

For these reasons the judgment should be affirmed, with costs.

EARL, PECKHAM and BARTLETT, JJ., concur with O'BRIEN, J.; FINCH, J., concurs with GRAY, J., ANDREWS, Ch. J., not sitting.

Judgment reversed.

PAUL WILLIAMS, Appellant, v. WILLIAM HAYS, Respondent.

An insane person is liable for his torts the same as a sane person, except for those torts in which malice and, therefore, intention, is a necessary ingredient.

In respect to this liability there is no distinction between torts of non-feasance and of misfeasance, and so an insane person is liable for injuries caused by his tortious negligence, and so far as this liability is concerned, is held to the same degree of care and diligence as a person of sound mind.

Where one of several joint owners of a vessel by contract with the others takes the vessel to sail it on shares, he to man her, to pay the crew, furnish supplies and have the absolute control and management thereof, he is in no sense the agent of his co-owners, but is the owner of the vessel *pro hac vice*.

Where the vessel is lost through the negligence of such an owner, he is liable to his co-owners for the loss.

Moody v. Buck (1 Sandf. 304), distinguished and disapproved.

In an action to recover for the loss of a vessel, alleged to have been caused by defendant's negligence, these facts appeared: Defendant, who was one of several joint owners of the vessel, he owning a minority interest, was sailing her under a contract with his co-owners as above specified; she encountered storms, and defendant for more than two days was constantly on duty; then becoming exhausted he went to his cabin, leaving the vessel in charge of the mate and crew. The mate found the rudder broken and useless; he caused defendant to come on deck, but the latter refused to believe the vessel was in any trouble and refused the help of tugs whose services were offered, the masters of which told him the vessel was drifting on shore. She did drift on shore in the daytime without any effort on the part of defendant or any of his crew to save her and she became a total loss. Defendant testified that from the time he came into his cabin until he found himself on shore he was unconscious and knew nothing that had occurred. The case was submitted to the jury on the theory that defendant, if sane, was guilty of negligence, but if

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insane was not responsible for the loss. *Held*, error; that, at least, unless it appeared that defendant had become insane solely on account of his efforts to save the vessel during the storm, he was chargeable with the consequences of his negligence.

As to whether, even in such a case, he would not be liable for the negligence of his servants, the mate and crew, *quære*.

Hays v. Phenix Ins. Co. (25 J. & S. 199; *affd.*, 127 N. Y. 656), distinguished.

The authorities on the subject of the liability of insane persons for torts collated.

(Argued April 26, 1894; decided November 2, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 18, 1892, which affirmed a judgment in favor of defendant entered upon a verdict and affirmed an order denying a motion for a new trial, and also affirmed an order denying a motion for a re-argument.

This action was brought by plaintiff, as assignee of the Phoenix Insurance Company, to recover the sum of \$893.89, paid to the firm of Parsons & Loud, as owners of one-sixteenth of a vessel, upon a policy of insurance issued by the Phoenix Insurance Company to said firm.

The facts, so far as material, are stated in the opinion.

George A. Black for appellant. Defendant was either the bailee of the vessel (as charterer) or their servant (as master) or both, and in either relation he was liable for his own negligence or the negligence of the crew in caring for their property. (*Webb v. Pierce*, 1 Curtis, 113; 3 Sumn. 146; *Thorp v. Hammond*, 12 Wall. 416; *Somers v. White*, 65 Maine, 542; *Quinn v. C. E. C. Co.*, 46 Fed. Rep. 506; Story on Agency, §§ 116, 314; Emerigon on Ins. chap. 12, § 4 [Meredith's translation], 279; *Id.* chap. 7, § 5, 154.) The insurance company acquired by subrogation all the rights of Parsons & Loud, and stood in their shoes. (*C. F. Ins. Co. v. E. R. Co.*, 73 N. Y. 399; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 594.) The plaintiff proved the willful destruction of the vessel by allowing her to drive on shore—an act without excuse or justification, and for which no shadow of excuse is

offered. (*Bazin v. S. S. Co.*, 3 Wall. Pr. 239; *Richlieu v. Ins. Co.*, 136 U. S. 423.) Proof of the highest order that defendant was insane would not discharge his liability to the plaintiff for the destruction of the property of Parsons & Loud, and, therefore, such proof was irrelevant. (*Madin v. Devlin*, 132 Mass. 87; *Morse v. Crawford*, 17 Vt. 499; *McIntyre v. Sholty*, 121 Ill. 660.) It was the duty of the trial court to direct a verdict. (*Tebo v. Jordan*, 62 Hun, 515.) The court should have set aside the verdict as against the evidence. (*Baulec v. N. Y. & H. R. R. Co.*, 59 N. Y. 356; *Dwight v. G. Ins. Co.*, 103 id. 558; *Bulger v. Rosa*, 119 id. 464; *Hall v. Stevens*, 116 id. 210.)

William W. Goodrich for respondent. Neither the master nor the ship is liable for a wreck growing out of the sudden disability of the master. (*Hays v. P. Ins. Co.*, 127 N. Y. 656; *Copeland v. M. Ins. Co.*, 2 Metc. 433; *Hamilton v. Pardo*, L. R. [12 App. Cas.] 518.) The defendant is not liable because the mate did not assume command of the ship. (*Hays v. P. Ins. Co.*, 127 N. Y. 56.)

EARL, J. The defendant and others, among whom were Parsons and Loud, were joint owners of the brig "Sheldon." By an arrangement between the defendant and the other owners he took the vessel to sail on shares. He was to man the vessel, to pay the crew and to furnish the supplies, and he was to have one-half of her earnings, after certain deductions, for his share, and the other owners were to have from him the other half, after certain deductions, for their share. He was to have the absolute control and management of the vessel, and became her owner *pro hac vice*. (*Webb v. Pierce*, 1 Curt. 113; *Thorp v. Hammond*, 12 Wall. 416; *Somes v. White*, 65 Me. 542.) The defendant, under the arrangement between him and the other owners, in no sense became their agent or servant. In *Webb v. Pierce* it was held that where a master hires a vessel on shares under an agreement to victual and man her, and employ her on such voyages as he thinks best, having thereby the entire possession,

command and navigation of her, he thereby becomes her owner *pro hac vice*, and the relation of principal and agent does not exist between him and the owners. The other cases are to the same effect. The defendant thus became the charterer or lessee of the vessel and was responsible to the other owners for due care in her management, and so the trial judge held.

The case of *Moody v. Buck* (1 Sand. 304), which holds that one co-owner of a vessel who takes and navigates her for his own benefit, is not liable to his co-owners for her loss by his carelessness, even if correctly decided upon the facts there existing, is not applicable to a case like this, where the co-owner takes the vessel, not in his right as co-owner for the purpose of using his own, but under an agreement with the other owners whereby he becomes the charterer, lessee or bailee of the vessel, and thus bound to some duty of care and fidelity. There can, however, be no question that that case was incorrectly decided, and the rule laid down therein is not consonant with reason or justice. I cannot find that it has ever been followed as authority in any subsequent case and it is in conflict with many authorities. (*Sheldon v. Skinner*, 4 Wend. 529; *Chesley v. Thompson*, 3 N. H. 9; *Herrin v. Eaton*, 13 Me. 193; *Martin v. Knowllys*, 8 T. R. 145; *Gillot v. Dossat*, 4 Martin [La.], 203; Domat's Civ. Law, § 1489; 1 Parsons on Maritime Law, 95; Ford's Law of Merchant Shipping, 35, 45; Cooley on Torts, 328, 659.)

The *Sheldon* was loaded with ice and started from the coast of Maine for a southern port. She soon encountered storms, and the defendant for more than two days was constantly on duty, and then becoming exhausted, he went to his cabin, leaving the vessel in charge of the mate and crew. He took a large dose of quinine and laid down. The mate found that the rudder was broken and useless, and that the vessel could not be steered. He caused the captain to come on deck. He refused to believe that the vessel was in any trouble, and refused the help of two tugs, the masters of which saw the difficulty under which his vessel was laboring, and successively offered to take her in tow. They cautioned him that his ves-

sel was gradually and certainly drifting upon the shore; and in broad day-light she did drift upon the shore without any effort upon the part of the defendant or any of his crew to save her, and she became a total wreck. Parsons and Loud had insured their interest in the Phoenix Insurance Company, and it paid them the loss. It thus became subrogated to their claim, if any, against the defendant for his negligence or misconduct in the management of the vessel, and it assigned that claim to the plaintiff. He, standing in the shoes of Parsons and Loud, brought this action against the defendant to recover damages for the loss of the vessel, alleging that it was due to his carelessness and misconduct.

The defendant claims that from the time he went to his cabin, leaving the vessel in charge of his mate and crew, to the time the vessel was wrecked, and he found himself in the life-saving station, he was unconscious and knew nothing of what occurred — that in fact he was from some cause insane, and, therefore, not responsible for the loss of the vessel. The case was submitted to the jury on the theory that the defendant, if sane, was guilty of negligence causing the destruction of the vessel, but if insane was not responsible for her loss through any conduct on his part which in a sane person would have constituted such negligence as would have imposed responsibility.

The important question for us to determine then is whether the insanity of the defendant furnishes a defense to the plaintiff's claim, and I think it does not. The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts, except perhaps those in which malice and, therefore, intention, actual or imputed, is a necessary ingredient, like libel, slander and malicious prosecution. In all other torts intention is not an ingredient, and the actor is responsible, although he acted with a good and even laudable purpose, without any malice. The law looks to the person damaged by another and seeks to make him whole, without reference to the purpose or the condition, mental or physical, of the person causing the damage. The liability of a

lunatic for his torts, in the opinions of judges, has been placed upon several grounds. The rule has been invoked that where one of two innocent persons must bear a loss, he must bear it whose act caused it. It is said that public policy requires the enforcement of the liability that the relatives of a lunatic may be under inducement to restrain him, and that tort feasons may not simulate or pretend insanity to defend their wrongful acts causing damage to others. The lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes, and the burden of such loss may not be put upon others.

In Buswell on Insanity (sec. 355) it is said: "Since in a civil action for a tort it is not necessary to aver or prove any wrongful intent on the part of the defendant, it is a rule of the common law that although a lunatic may not be punishable criminally, he is liable in a civil action for any tort he may commit."

In Cooley on Torts (98) the learned author says: "A wrong is an invasion of right to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only. Therefore, the law in giving redress has in view the case of the party injured, and the extent of his injury, and makes what he suffers the measure of compensation. * * * There is consequently no anomaly in compelling one who is not chargeable with wrong intent to make compensation for an injury committed by him; for, as is said in an early case, 'the reason is because he that is damaged ought to be recompensed.'" And at page 100 he says: "Undoubtedly there is some appearance of hardship—even of injustice—in compelling one to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law demands of one in the full possession of his faculties. But the question

of liability in these cases, as well as in others, is a question of policy, and it is to be disposed of as would be the question whether the incompetent person should be supported at the expense of the public, or of his neighbors, or at the expense of his own estate. If his mental disorder makes him dependent, and at the same time prompts him to commit injuries, there seems to be no greater reason for imposing upon the neighbors or the public one set of these consequences rather than the other; no more propriety or justice in making others bear the losses resulting from his unreasoning fury when it is spent upon them or their property, than there would be in calling upon them to pay the expense of his confinement in an asylum when his own estate is ample for the purpose."

† In *Shearman and Redfield on Negligence* (sec. 57) it is said: "Infants and persons of unsound mind are liable for injuries caused by their tortious negligence; and, so far as their responsibility is concerned, they are held to the same degree of care and diligence as persons of sound mind and full age. This is necessary, because otherwise there would be no redress for injuries committed by such persons, and the anomaly might be witnessed of a child, having abundant wealth, depriving another of his property without compensation."

* In *Reeves' Domestic Relations* (386) it is said: "Where the minor has committed a tort with force, he is liable at any age; for in case of civil injuries, with force, the intention is not regarded; for in such case a lunatic is as liable to compensate in damages as a man in his right mind."

The doctrine of these authorities is illustrated in many interesting cases. (*Bullock v. Babcock*, 3 Wend. 391; *Hartfield v. Roper*, 21 id. 615; *Krom v. Schoonmaker*, 3 Barb. 647; *Conklin v. Thompson*, 29 id. 218; *Cross v. Kent*, 32 Md. 581; *Neal v. Gillett*, 23 Conn. 437; *Huchting v. Engel*, 17 Wis. 230; *Brown v. Howe*, 9 Gray, 84; *Morain v. Devlin*, 132 Mass. 87; *Beales v. See*, 10 Penn. St. 56; *Humphrey v. Douglass*, 10 Vt. 71; *Morse v. Crawford*, 17 id. 499; *Cross v. Andrews*, Croke, Elizabeth, 622; *Jennings v. Rundall*, 8 T. R. 336.)

In *Bullock v. Babcock* Judge MARCY, writing in a case where an infant twelve years old was held liable for putting out one of the eyes of another infant, said: "The liability to answer in damages for trespass does not depend upon the mind or capacity of the actor; for idiots and lunatics are responsible in the action of trespass for injuries inflicted by them."

In *Krum v. Schoonmaker* it was held that a lunatic may be sued for an injury done to another, because the intent with which the act was done is not material. There the action was against a justice of the peace for false imprisonment for issuing a warrant without any complaint, by virtue of which the plaintiff was arrested.

In *Cross v. Kent* it was held that a lunatic or insane person, though not punishable criminally, is liable to a civil action for any tort he may commit; that in an action against a party for setting fire to and burning a barn, neither evidence of his lunacy, nor that the burning was the result of accident, is admissible in mitigation of compensatory damages.

In *Neal v. Gillett*, in an action on the case for damages caused by the negligence of the defendants, who were severally of the ages of thirteen and sixteen at the time of the injury, it was held that where the plaintiff claims only actual damages, the youth of the defendants is not to be taken into consideration in determining the question of their negligence.

In *Huchting v. Engel* it was held that an infant, though under seven years of age, was liable in an action of trespass for breaking and entering the plaintiff's premises and breaking down and destroying his shrubbery and flowers.

In *Karow v. The Continental Insurance Company* it is said in the opinion: "While the burning of his own property by an assured under no restraint of duty and incapable of care, and without any intent or design, does not relieve the company from liability, yet the same act of burning another's property might subject such person to damages therefor, not on the ground of negligence, as that word is usually understood, but, in the language of Chief Justice GIBSON, 'on the

principle that where a loss must be borne by one of two innocent persons, it should be borne by him who occasioned it.'"

In *Brown v. Howe* an insane person carelessly set fire to the dwelling house of his guardian, and while it was held that the guardian could not be allowed the amount of his damages in his probate account, it was held that his only course was to sue the administrator of the lunatic who had died, in a court of law, and have a judgment fixing his damages, and collect it from the assets, if the estate was solvent; if not, to share with the other creditors.

In *Morain v. Devlin* it was held that a lunatic was civilly liable for an injury caused by the defective condition of a place, not in the exclusive occupancy and control of a tenant, upon real estate of which he is the owner, and of which his guardian has the care and management.

In *Beales v. See* it was said by GIBSON, C. J.: "As an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes, on the principle that where a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it."

In *Morse v. Crawford*, in an action for tort, it was held that the fact that the defendant was insane at the time of committing the injury was no defense to the action, and that if the action be for destroying property intrusted to the defendant, it is no defense that the plaintiff, at the time of delivering the property to the defendant, knew that he was insane. In the opinion of the court it is said: "It is a common principle that a lunatic is liable for any tort which he may commit, though he is not punishable criminally. When one receives an injury from the act of another, this is a trespass, though done by mistake or without design. Consequently no reason can be assigned why a lunatic should not be held liable."

In *Jennings v. Rundall* Lord Chief Justice KENYON said: "If an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice." LAWRENCE, J., also writing in that case, mentioned the dis-

inction between negligence and an act done by an infant; and he held that the same rule would have to be applied if an action were brought against an infant for negligently keeping the plaintiff's cattle, by which they died, as would be applied if the declaration charged the infant with having given the cattle bad food by which they died. +

There can be no distinction as to the liability of infants and lunatics, between torts of non-feasance and of misfeasance — between acts of pure negligence and acts of trespass. The ground of the liability is the damage caused by the tort. That is just as great whether caused by negligence or trespass; the injured party is just as much entitled to compensation in the one case as in the other, and the incompetent person must, upon principles of right and justice and of public policy, be just as much bound to make good the loss in the one case as the other; and I have found no case which makes the distinction. That infants and lunatics are liable for damage to property caused by their negligent acts, was asserted in several of the authorities above cited; and it has never been doubted that at common law an action of trover would lie against one intrusted with the personal property of another who destroys it, whether the destruction be by a negligent act or a willful tort. +

I sum up the result of my examination of the authorities as follows: This vessel was intrusted to the defendant — not as agent — but as to the other owners as charterer, lessee or bailee, and if he caused her destruction by what in sane persons would be called willful or negligent conduct, the law holds him responsible. The misfortune must fall upon him and not upon the other owners of the vessel.

If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and while it was raging his efforts to save the vessel were tireless and unceasing, and if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought

not to be attributed to him as a fault. In reference to such a case we do not now express any opinion.

If it could be held that the obligation of the defendant to take due care of the vessel while she was in his possession, under his contract with the other owners, was an obligation springing out of his contract, and thus a contract obligation, such a view of the case would not aid him. He was sane when he entered into the contract, and his subsequent insanity would furnish no defense to an action for a breach of the contract. (*Oakley v. Mortin*, 11 N. Y. 625; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 id. 487; *Evans v. United States Life Insurance Co.*, 64 id. 304; *Spalding v. Rosa*, 71 id. 40.)

If it should be found upon the new trial of this action that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should, therefore, be held that no fault could be attributed to him on account of what he personally did or omitted to do, then the question would still remain whether the carelessness of his mate and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their carelessness. They did nothing whatever to save the vessel. They did not even expostulate with him or tender him any advice or a word of caution, and yet the mate saw what the captains of the tugs saw at a distance, that something was the matter with him. It is difficult to perceive how they could have failed to see that he was either incompetent to manage the vessel, or that he was willfully wrecking her. We leave the effect of their conduct upon the defendant's liability to be determined, if it should become necessary, upon the new trial, simply saying that the question is worthy of careful consideration, whether the defendant can allege his own incompetency, and at the same time claim that for any reason the mate ought not to have taken control of the vessel.

The case of *Hays v. Phenix Insurance Co.* (25 J. & S. 199; aff., 127 N. Y. 656), which seems to have controlled the decision below, is not an authority for the defendant. There he brought an action against the insurance company to recover

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the amount of his insurance upon this vessel, and his mere carelessness, whether sane or insane, was no defense to such an action. It is an unquestioned rule of law that an insurance company cannot successfully defend an action upon its policy to recover for a loss by showing that the insured destroyed the property while insane, or that its destruction was caused by the carelessness of his agents and servants. The liability of the insured to respond in damages for the loss or destruction of the property of another owner stands upon different principles. (*Liverpool S. Co. v. Phoenix Insurance Co.*, 129 U. S. 438; *Karow v. Continental Insurance Co.*, 57 Wis. 56.)

Since writing the above, suggestions have been made by some of my brethren which should receive some attention.

The fact that the defendant was a part owner of the vessel can play no part in this discussion. He did not take the vessel as part owner, but under the contract with the other owners; and as to them, his duties and obligations were such as spring from the relation created by that contract. Further, he was the minority part owner, and the others were the majority part owners, and, as such, had the right and the power to control the vessel against his will. (*Ward v. Ruckman*, 36 N. Y. 36; *Gould v. Stanton*, 16 Conn. 12; *The William Bagaley*, 5 Wall. 406; *McLochlin's Merchant Shipping*, 89.) In *Ward v. Ruckman* it was held that the majority owners of a vessel have the right to displace the master at their pleasure, though he be in possession as part owner. In making their contract with the defendant, the other part owners were exercising their right as the majority part owners. *Non constat*, but that they would, except for the contract, have displaced the defendant and appointed some other person master of the vessel. Therefore, as I have before said, he must be treated as the charterer, lessee or bailee of the vessel.

I quite agree, and no one in this case has contended for more, that the defendant was bound, in the navigation and use of the vessel, to bestow only ordinary care, to wit: Such care as a reasonably careful and prudent owner would ordinarily give to his own vessel. Such is the standard of care set

up for all bailees of personal property for hire. But what is that standard? It is not such care as a lunatic, a blind man, a sick man, or a man otherwise physically or mentally imperfect or impotent could give. Such a man is not the jural man of ordinary prudence, and he does not furnish the standard. The standard man is no individual man, but an abstract or ideal man of ordinary mental and physical capacity and ordinary prudence. The particular man whose duty of care is to be measured does not furnish the standard. He may fall below it in capacity and prudence, yet the law takes no account of that, but requires that he should come up to the standard and his duty be measured thereby.

So when we have defined, as above, the duty of care resting upon the defendant, we have made no progress in the solution of the question here involved, for it is conceded that he took no care whatever. It is sought, however, to excuse him because he was insane and incapable of care; and the question, and, in the end, the sole question for us to determine, is whether that excuse is a good one; and I have heard no argument to sustain it. It is unquestioned that an insane person is civilly liable for his active torts; and is there then any reason for saying that he is not liable for his negligent torts? To uphold this judgment, we must engraft upon the general rule the exception or qualification that he is not liable for his negligent torts. If the defendant had taken a torch and fired the vessel, he would have been liable for her destruction, although his act was unconscious and accompanied by no free will. But if he had negligently fired the vessel and thus destroyed her, being incapable from his mental infirmity from exercising any care, the claim must be that he would not be liable. Such a distinction is not hinted at in any authority, has no foundation whatever in principle or reason, and cannot stand with authorities I have before cited.

My conclusion, therefore, is that the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except PECKHAM, GRAY and O'BRIEN, JJ., dissenting.

Judgment reversed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
JOHN Y. MCKANE, Impleaded, etc., Appellant.

The provision of the Penal Code (§ 29) which declares that "a person who, directly or indirectly, counsels, commands, induces or procures another to commit a crime is a principal," applies to the provision of said Code (§ 41c) declaring that any member of a registry board who willfully violates any provision of the Election Law relative to the registration of electors shall be punishable by imprisonment, etc.

A person, therefore, who, although not a member of a board of registry, induces or procures its members to willfully violate a provision of the Election Law (Chap. 680, Laws of 1892) in relation to the registration of voters, is guilty of a crime and may be indicted as a principal jointly with the members of the board.

Defendant was indicted jointly with inspectors of election constituting a board of registry for a willful violation of the provision of said law (§ 38), which directs the inspectors to make three copies of the register of voters, and requires that the register and copies "shall at all reasonable hours be accessible to the public for examination or for making copies thereof." Defendant was not a member of the board of registry, but was charged with willfully and feloniously procuring, by his aid, counsel, command and assistance, the inspectors to conceal the lists and to refuse the public access thereto. Defendant was tried separately; upon the trial no direct evidence was given that he committed or advised the inspectors to conceal the registry lists, but the prosecution attempted to show a criminal conspiracy on the part of defendant and other public officials of the town for the purpose of casting a large fraudulent vote, and a concealment of the lists as a necessary part of the scheme. No conspiracy was charged in the indictment. *Held*, unnecessary, as the conspiracy, if shown, was evidence in support of the charge made.

When sufficient evidence of a conspiracy has been given to make the question one for the jury, evidence of the acts and declarations of the alleged conspirators in furtherance of the common purpose is competent.

These facts appeared on the trial: The town board of the town of G., of which board defendant, as supervisor, was the presiding officer, divided the town into six election districts. These were so arranged that all of them converged in the town hall, in which building the registry lists were prepared and the vote cast for the entire town. The inspectors in all the districts concealed the registry lists and willfully neglected and refused to give the public access to them, and the evidence tended to show that they were all acting in furtherance of a common plan. G., a candidate for an office to be voted for at the election, instituted judicial proceedings to compel the performance of their duty by the inspectors. Defendant employed counsel to resist these proceedings, and made an

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affidavit, to be used therein, in which he stated, among other things, that he had examined the lists and that they contained no fraudulent names. Defendant was chief of police, and as such and as chairman of the town board, had charge and control of the town hall. G. sent a large body of men to the town hall to obtain access to the lists and make copies thereof; they were all driven from the hall, some beaten and some arrested and imprisoned. Another body of G.'s supporters, who went to the town hall on election day for the purpose of watching the proceedings, were treated in a similar manner. Many were arrested without cause. Defendant was the leader in all these proceedings. The registry lists contained a great number of names of persons not legal voters and not residents of the town, and the vote at the election, as reported and certified by the canvassers, was much larger than the number of actual voters. Defendant had been supervisor for eight successive terms, and during that time the vote of the town was nearly unanimous in favor of the candidates he supported, which were sometimes of one political party, sometimes of another. *Held*, that the evidence was sufficient to sustain the indictment.

A witness for the prosecution testified to declarations made to him by defendant in a conversation through the telephone; at the time the witness did not know defendant, or recognize his voice. The witness further testified that he heard an affidavit made by defendant read in his presence, in which he stated he had the conversation by telephone testified to, giving, however, a different version of it. This affidavit was introduced in evidence by defendant who also testified as to the conversation. *Held*, that while the testimony as to the conversation was inadmissible when given, the objection was cured by what subsequently appeared.

Also *held*, that testimony as to the arrest of the persons seeking to examine the registry and to watch the proceedings at the election was competent.

Also *held*, that evidence on the part of the prosecution as to the receipt of large sums of money by defendant as supervisor was competent, and that the receipt of evidence of the sale of liquors on Sunday by the saloons in the town was not reversible error.

Also *held*, that evidence as to the arrangement of the election districts was properly received, as was also evidence as to the number of legal voters in the town.

Also *held*, that the poll lists were properly given in evidence.

Defendant, as a witness in his own behalf, testified that the number of voters in the town had increased since the vote of previous years. *Held*, that the poll lists of those years were properly received in evidence.

On cross-examination of defendant various questions were asked as to his official acts in administering the affairs of the town, the position he held in politics and his ability to control the action of both political organizations. The testimony was received under objection and exception. *Held*, no error.

Defendant called witnesses to prove his good character. On their cross-examination various questions were asked, and they were permitted to

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answer under objection and exception as to what they had heard in respect to defendant's political power and influence. *Held*, no error.

A witness for the prosecution was permitted to testify that when the registry lists were nearly completed he went to the town hall, where he found a man in charge who, by his dress, appeared to be a policeman; that witness told the man he wanted to see the lists in order to make copies, and the answer was that he could not do so without an order from defendant. Defendant subsequently admitted that the man was acting under his orders. *Held*, that the evidence was properly received.

Another witness for the prosecution was permitted to testify that he served an order of the court in the proceedings to obtain access to the lists upon the chairman of one of the boards of registry, and also as to what was said to him at the time. *Held*, no error.

The witness further testified that he served a like paper on another member of the board, and added that the person served said he was going to hand the paper to defendant. This was not called for by any question of the prosecution. *Held*, that while the testimony was inadmissible, in the absence of any motion to strike it out, there was no error.

Evidence was also received to the effect that one of the inspectors, who was also a principal of a school in the town, having six teachers under his charge, was absent three days during the time the efforts to obtain access to the registry lists were being made. *Held*, no error.

(Argued October 29, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made August 27, 1894, which affirmed a judgment of the Court of Oyer and Terminer of Kings county entered upon a verdict convicting defendant of the crime of willfully violating a provision of the Election Law relative to the registration of electors in the first district of the town of Gravesend.

The facts, so far as material, are stated in the opinion.

Matthew Hale, Edward C. James, Albert C. Tennant and George W. Roderick for appellant. The proceedings in this case have been void from their very inception for want of jurisdiction. The governor had no power or authority to appoint an extraordinary Court of Oyer and Terminer. There is no such tribunal known to the law. His attempt to create

one, and all proceedings founded upon it, are unlawful and void. (Code Civ. Pro. § 234; *Appel v. People*, 20 N. Y. 531; Code Civ. Pro. §§ 1, 2, 3; Code Crim. Pro. §§ 313, 485.) The facts stated in the indictment do not constitute a crime. (Penal Code, §§ 29, 96; Laws of 1892, chap. 693; *People v. Mather*, 4 Wend. 229; *People v. Blivin*, 112 N. Y. 82; *Shannon v. People*, 5 Mich. 71; *People v. Kief*, 126 N. Y. 663.) The indictment does not contain a plain and concise statement of the act or acts constituting the alleged crime, as required by sections 275 and 276 of the Code of Criminal Procedure. (*People v. Stark*, 59 Hun, 51, 55; 136 N. Y. 538; *People v. Dumar*, 106 id. 502; *People v. Burns*, 53 Hun, 274.) More than one crime is charged in the indictment. (Code Crim. Pro. §§ 278, 279; *Shannon v. People*, 5 Mich. 71; *People v. Upton*, 38 Hun, 107, 110; *People v. Rose*, 39 N. Y. S. R. 292; *People v. Tower*, 135 N. Y. 457, 459; *People v. O'Donnell*, 46 Hun, 358; *People v. Harmon*, 49 id. 558; 112 N. Y. 666.) There was error in the admission of incompetent and irrelevant evidence. Before the acts and declarations of an alleged co-conspirator can be given in evidence against a defendant, the fact of conspiracy must first be proven by independent evidence. (3 Greenl. on Ev. [13th ed.] §§ 32, 94; 2 Whart. on Ev. § 1205, 1206; 2 Bish. Crim. Pro. [3d ed.] § 1248; *Carpenter v. Sheldon*, 5 Sandf. 77; *Jones v. Hurlburt*, 39 Barb. 403; *Peck v. Yorks*, 47 id. 131; *Cuyler v. McCartney*, 40 N. Y. 221; *Ormsby v. People*, 53 id. 472; *N. Y. G. & I. Co. v. Gleason*, 78 id. 503; *People v. Kief*, 58 Hun, 337; 126 N. Y. 661; *People v. Davis*, 56 id. 95; *People v. McQuade*, 110 id. 284; *People v. Sharp*, 107 id. 464; *Osburn v. Robbins*, 7 Lans. 44; *Logan v. U. S.*, 144 U. S. 263; *Coleman v. People*, 55 N. Y. 81.) The admission of telephonic communication was incompetent and improper. (*People v. Ward*, 3 N. Y. Crim. Rep. 783; *Murphy v. Jack*, 142 N. Y. 215; *People v. Tice*, 131 id. 651; *Smith v. Easton*, 51 Md. 138; *O. S. Co. v. Otis*, 100 N. Y. 446, 453; Code Crim. Pro. § 393; *People v. Rose*, 52 Hun, 38.) Evidence of defendant's official and

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political action was incompetent. (*People v. Thacher*, 55 N. Y. 525; *People v. Crapo*, 76 id. 291; *Coleman v. People*, 55 id. 81; *People v. Sharp*, 107 id. 427, 460, 461; *Van Bokkelen v. Berdell*, 130 id. 141.) The general principles in regard to the reception of immaterial evidence in criminal cases should be applied here. (*V. R. R. Co. v. O'Brien*, 119 U. S. 99; *Green v. Disbrow*, 56 N. Y. 334; *Carroll v. Diemel*, 95 id. 252; *Dunn v. State*, 2 Ark. 228; *People v. Greenwall*, 108 N. Y. 296, 301; *Copperman v. People*, 56 id. 593; *Corbin v. People*, 56 id. 363; 2 Russell on Crimes [6th ed.], 776; *Spies v. People*, 122 Ill. 1.)

Edward M. Shepard and *Benjamin F. Tracy* for respondent. The extraordinary term of the Oyer and Terminer was regular. (*Apps v. People*, 20 N. Y. 531; *People v. Petrea*, 92 id. 128; Code Crim. Pro. § 226.) The order denying motion to quash is not reviewable on this appeal. (Code Crim. Pro. § 517; *People v. Petrea*, 30 Hun, 98; *People v. Sharp*, 45 id. 460; *People v. Horey*, 30 id. 354.) The motion to quash was properly denied. (Laws of 1892, chap. 18, § 202; *People v. Palen*, 74 Hun, 289; Code Civ. Pro. § 313; *People v. Allen*, 57 Barb. 338; *People v. Hooghkerk*, 96 N. Y. 149; Code Civ. Pro. §§ 278, 279; *People v. Adler*, 140 N. Y. 331; *People v. Bork*, 91 id. 5; *Pontius v. People*, 82 id. 339; *People v. Krank*, 110 id. 448; *State v. Jones*, 83 N. C. 605; *U. S. v. Snyder*, 14 Fed. Rep. 554; *U. S. v. Bayer*, 4 Dill. 409; *State v. Sprague*, 4 R. I. 257; *People v. Chapman*, 62 Mich. 280; *People v. Bliven*, 112 N. Y. 79.) The motion for an election between the first and second counts was properly denied. (*Osgood v. People*, 39 N. Y. 449.) The verdict was supported by the evidence. (3 Greenl. on Ev. § 93; Wright on Conspiracy, 129, 212; Whart. on Crim. Law [9th ed.], 1398; Whart. on Crim. Ev. § 298; Bish. on Crim. Pro. [3d ed.] 237.) The objection to proof that the appellant was a member of the health board was not well taken. (*People v. Harris*, 136 N. Y. 423.) Questions put to the appellant about his official conduct as chief of

police, with reference to liquor selling and otherwise, were proper. (*La Beau v. People*, 34 N. Y. 223; *Brandon v. People*, 42 id. 265; *Connors v. People*, 50 id. 240; *People v. Clark*, 102 id. 735; *People v. Tice*, 131 id. 651; *People v. McCormick*, 135 id. 663; *State v. Witham*, 72 Maine, 533; *McDonald v. Comm.*, 4 S. W. Rep. 687; *Moses v. State*, 58 Ala. 117.) Cross-examination of character witnesses was proper. (*McDonel v. State*, 90 Ind. 320.) Courts take judicial notice of the populations of political divisions within their jurisdiction. (1 Greenl. on Ev. §§ 4, 5, 6; *Farley v. McConnell*, 7 Lans. 428; 52 N. Y. 630; *In re Jacobs*, 33 Hun, 374; 98 N. Y. 98; *Mertz v. City of Brooklyn*, 128 id. 617; *Curry v. City of Buffalo*, 135 id. 366.) Statements of results of elections for 1890, 1891, 1892 and 1893 were properly admitted in evidence. (*People v. Thacher*, 55 N. Y. 525.) Shanahan's testimony of interviews with Morris and Tuttle was proper. (*McCarnoy v. People*, 83 N. Y. 408.) Objections to the admission in evidence of testimony as to acts and declarations of persons other than the appellant done or made not in his presence were properly overruled. (1 Greenl. on Ev. § 111; 3 id. § 94; *U. S. v. Gooding*, 12 Wheat. 460, 469; *A. F. Co. v. U. S.*, 2 Pet. 358; *Lincoln v. Claflin*, 7 Wall. 132, 139; *Nudd v. Burrows*, 91 U. S. 426; *Logan v. U. S.*, 144 id. 263; *Cuyler v. McCartney*, 40 N. Y. 221; *People v. Davis*, 56 id. 95; *Dewey v. Moyer*, 72 id. 70, 80; *N. Y. G. & I. Co. v. Gleason*, 78 id. 514; *Potts v. Hart*, 99 id. 168; *People v. McQuade*, 110 id. 306; *Leonard v. Poole*, 114 id. 371, 378; *Smith v. N. B. Society*, 123 id. 85; *People v. Kief*, 58 Hun, 337; 126 N. Y. 661; *Galle v. Tode*, 74 Hun, 542, 549, 550; *Spies v. People*, 122 Ill. 1, 224, 228, 229; *Comm. v. Crowninshield*, 10 Pick. 497; *Comm. v. McDonald*, 147 Mass. 527; *Comm. v. Smith*, 151 id. 491; *State v. Glidden*, 55 Conn. 46; *Comm. v. O'Brien*, 140 Penn. St. 555; *Queen v. Most*, L. R. [7 Q. B. D.] 244; *People v. Sharp*, 107 N. Y. 427.) Acts done by the appellant and other conspirators in other districts than the first were admissible as part of the conspiracy.

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(*People v. Sharp*, 107 N. Y. 427; *People v. Dimick*, Id. 32; *Phillips v. People*, 57 Barb. 353; 42 N. Y. 200; *Shipply v. People*, 12 Wkly. Dig. 239; 86 N. Y. 375.)

O'BRIEN, J. The defendant and the three inspectors of election of the first election district of the town of Gravesend were indicted jointly for a violation of certain provisions of the law governing elections and the registry of voters, preparatory for the general election of November, 1893. (Laws of 1892, ch. 680.)

Briefly stated, the charge was that the three inspectors, constituting the registry board, having met and organized, subsequently made and completed a list of voters and certified the same, willfully and feloniously neglected and refused to have three certified copies of the same at all reasonable hours accessible to the public for examination, and for making copies thereof, but on the contrary caused the same to be concealed from the public and kept so that they were not accessible for examination or for making copies thereof.

The charge against the defendant was that he willfully, maliciously and feloniously procured the other defendants, members of the board of registry, to so conceal the lists and to neglect and refuse to cause the lists to be accessible to the public for examination and for making copies of the same, by his aid, counsel, command and assistance. The defendant was tried separately and convicted, and the judgment affirmed by the Supreme Court.

In view of the able and exhaustive examination that the case received in the court below upon appeal it is thought to be unnecessary to refer at much length to the vast mass of facts produced at the trial bearing more or less upon the issue though relating to many subjects and events that appear in the enormous record that accompanies the appeal.

These facts will doubtless be of interest to some future historian of the locality, or of the public events with which they are connected, as they illustrate a most singular condition of things in local government and an extraordinary individual

career ; but it is believed that a very brief and general reference to a few of the leading ones is all that is essential to the disposition of the questions of law which (alone) we have the power to review. It is important, however, to get a clear view of the statute law that underlies the charge and the judgment. The thirty-first and thirty-second sections of the Election Law, which has been referred to, provide for the time and place of the meeting of the inspectors of election in each district in towns, as a board for the registry of voters, and the manner of preparing the lists. The next section directs the inspectors at the close of each meeting, as a board of registry, to append to their list a certificate to the effect that such list, as it then is, is a correct list of all persons qualified to vote in the district at the next election whose names the board is required by law to place thereon. The remainder of the section contains the provision which it is claimed was violated by the inspectors in this case and reads as follows :

"Each such list, so certified, shall remain in the custody of the chairman of inspectors, until the close of the polls on election day. At each meeting of the inspectors for registry, or during the next following secular day, the inspectors shall make three certified copies of such list and certificate, one of which shall forthwith be conspicuously posted in the place where such meeting shall have been held, and one shall be retained by each of the other two inspectors, until the close of the polls of such next election. Such list and registry of voters, and the certified copies thereof, shall at all reasonable hours be accessible to the public for examination or for making copies thereof."

The penalty for neglecting or refusing to obey this statute, on the part of the board of registry, is thus defined by a provision of the Penal Code :

"§ 41c. Any member or clerk of a registry board, who willfully violates any provision of the election law relative to registration of electors, or willfully neglects or refuses to perform any duty imposed on him by law, or is guilty of any

fraud in the execution of the duties of his office, shall be punishable by imprisonment for not less than two and not more than ten years."

These provisions, however, apply to the members and clerks of registry boards, and as the defendant was neither, the charge could not be sustained without the aid of another provision of the same Code which reads as follows: "§ 29. A person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids or abets in its commission, and, whether present or absent, and a person who directly, or indirectly, counsels, commands, induces or procures another to commit a crime, is a principal." The learned counsel for the defendant contends that this section does not apply to the charge contained in the indictment and was not intended to apply to it since the defendant would be guilty of nothing higher than a misdemeanor in case he had actually violated other and apparently more important provisions of the law, or had actually destroyed the registry lists himself. It is quite true that the penalties prescribed by the statute for violation of the several duties and obligations imposed upon election officers and others have not been adjusted with a very nice regard to what would seem to be the relative importance of each offense. The counsel's argument might very properly have been addressed to the legislature while engaged in framing the law, and if it had a special provision would doubtless have been inserted for the punishment of the special offense charged in the indictment in order to take it out of the operation of the general law. But the language of section twenty-nine is so clear and comprehensive that any attempt now to take the offense of which the defendant was convicted out of it, by judicial construction, would be useless.

The contention is also made that it was legally impossible for the defendant to commit the offense charged since he was not an inspector of election or other registry officer. He could not, of course, be guilty of those acts charged in the indictment against the inspectors, involving neglect of official

duty and other misconduct as public officers, since he had no duty to perform with regard to the registry lists. But it was possible to induce and procure the inspectors to commit the offense charged against them by command, counsel or advice, and that is the precise offense of which he was convicted. The argument for the defendant on this branch of the case goes to the full extent of asserting that no legal offense whatever was committed by the defendant, though all the allegations in the indictment be taken as true. He who by command, counsel or assistance procures another to commit a crime is, in morals and in law, as culpable as the actual visible actor himself, for the reason that the criminal act, whatever it may be, is imputable to the person who conceived it and set the forces in motion for its actual accomplishment. The fact that he may, for some reason, be incapable of committing the same offense himself is not material so long as it can be traced to him as the moving cause by instigating others to do what he could not do himself. This was the rule of the common law and it has been applied to offenses like this under special statutes. (*People v. Bliven*, 112 N. Y. 79; *State v. Sprague*, 4 R. I. 257; *State v. Jones*, 83 N. C. 605; *U. S. v. Snyder*, 14 Fed. Rep. 554; *U. S. v. Bayer*, 4 Dillon, 409; 1 Hale P. C. 629; 1 Hawk. P. C. chap. 41, § 10; 1 Arch. Crim. Pr. [Pom. ed.] 998; *State v. Comstock*, 36 Iowa, 265; *People v. Chapman*, 62 Mich. 280.)

Numerous questions were raised, discussed and decided at the trial in regard to the organization of the court and the form and sufficiency of the indictment. There was a motion to quash, a demurrer and a motion in arrest of judgment and the decision in each case was in favor of the People. In so far as these various proceedings raised any question not already considered and not embraced in the exceptions which will be noticed hereafter, they do not require any special discussion. Nor is it important now to decide whether the decisions made in these motions and proceedings at the trial are all reviewable in this court, since, after a careful examination, we are satisfied that they do not present any substantial question and the

objections thus raised have been fully and quite satisfactorily answered in the opinions below.

The remaining questions arise upon exceptions taken in the course of the trial and they grow out of the mode of proving the charge which was adopted by the prosecution. There was no direct evidence that the defendant counseled or advised the inspectors to conceal the lists or otherwise violate the law. What the prosecution attempted to show was a criminal conspiracy or general scheme, in which many public officials were engaged, for the purpose of casting a large fraudulent vote at the election, and that the concealment of the registry lists from the public, prior to the election, was or became a necessary part of the scheme. No conspiracy was charged in the indictment, nor was it necessary, since the conspiracy, if shown, was evidence in support of the charge stated from which the jury might find the main fact in issue, namely, that the defendant did counsel, advise and abet the unlawful acts of the inspectors.

Here the inquiry necessarily took a very wide range. To enumerate all the various facts and circumstances adduced in support of this theory, and which were claimed to have some direct or remote bearing upon the issue, would extend this discussion beyond all reasonable limits and would aid but little in giving a clear understanding of the case. It will be quite sufficient to state, in as brief a manner as possible, a few of the most prominent facts and circumstances which the evidence tended to establish, and which, when connected together, it was claimed pointed directly to the truth of the charge against the defendant.

The town of Gravesend, though really a suburb of the city of Brooklyn, had no other local government than that of a rural town in this state, with the possible exception of a large police force which became necessary from the nature of the business conducted there and from the fact that during the summer season a very large number of people made it a resort for pleasure and entertainment of various kinds. In 1890 the town board, of which the defendant, as supervisor, was the

presiding officer, divided it into six election districts. The division was so arranged that all the districts converged in the town hall, a building seventy-eight feet long and thirty-seven feet wide, situated in the village of Gravesend. In this building the registry lists were prepared and the vote cast for the entire town. This situation was peculiarly favorable for the purpose of bringing all the machinery of elections under the influence and control of a single mind, especially when that mind dominated all the business and political interests in the town.

That the inspectors, not only in the first district, but in the other five as well, willfully neglected and refused to give the public access to the lists or an opportunity to copy them, and that they in fact concealed them, was established by abundant evidence. There was not only failure and neglect on their part to perform the plain and simple duty enjoined by the statute, but active opposition and obstruction to all attempts by parties interested in the result of the election to inspect or copy the lists. For this purpose various devices and expedients were resorted to tending to show that they were all acting in furtherance of a common plan and for the accomplishment of a common purpose.

When all efforts in that direction had failed, Mr. Gaynor, who was a candidate for justice of the Supreme Court to be voted for at the election, applied to the courts for the purpose of compelling the performance of this duty by the inspectors through the appropriate judicial process. The defendant retained counsel to resist these proceedings, and they were resisted and defeated by means of technical objections, and the active interest taken by the defendant in defeating all proceedings in the courts to give the public access to the lists, although he was not a party to them, was a circumstance of much significance. Moreover, in the course of the proceedings he made an affidavit to be used in opposition, and which was so used, in which he stated, among other things, that he had examined the lists and that they contained no fraudulent names. Considering the state of the registry, as it then existed, this state-

ment, and the purpose for which it was made, furnished some evidence of the defendant's knowledge of the manner in which the lists were made, and, generally, of the common end in view. The defendant's active participation in hindering and obstructing any access on the part of the public to the registry lists, and in preventing any fair scrutiny of the vote as it was being cast, was shown by other acts amounting to a great abuse of power. The defendant, being the chief of police and chairman of the town board, had the charge and control of the town hall, where the registry was made and the election held. The efforts of Mr. Gaynor to procure copies of the registry lists continued for several days up to the election, but without success. A day or two before election he sent a large body of men to the hall for the purpose of obtaining access to the lists and making copies. They were all driven from the hall, some of them beaten, and most of them arrested and imprisoned. On the day of the election another body of the candidate's friends and supporters went to the place where the election was being held for the purpose of watching the proceedings and scrutinizing the vote. These men fared even worse than the copyists. The time, manner and circumstances of these arrests of many persons, without cause, proved the ability of the defendant to wield absolute power, and indicated an utter disregard for personal rights and contempt for justice and law. The defendant was the leading spirit and moving power in all these proceedings, aided, as he was, by the police and the justice of the peace who issued the process under which the arrests were made, all, evidently, under his control and influence.

Another important fact was established by evidence quite persuasive and convincing. The registry lists were beyond all doubt fraudulent. They contained a great number of names that did not represent legal voters in the town, or even actual residents, and the vote at the election as reported and certified by the canvassers was also, though perhaps not correspondingly, fraudulent.

The enumeration or census taken under the authority of the

state in February, 1892, showed that the total population of the town, including women, minors and aliens, was 8,343. There is no reason to believe that during the period of less than two years that elapsed between this enumeration and the election in question, there was any substantial increase in the number of actual voters. The registration lists, however, contained 6,580 names, and the total vote reported was 3,676.

Aside from the inferences to be drawn from these figures, it should be observed that there were numerous names on the registry without any sufficient designation of the place of residence, and the poll list, kept by the inspectors, showed that during the progress of the voting, at frequent intervals, blocks of names were recorded in suspicious alphabetical order as voting, and other strange coincidences appeared that could not, or at least would not be likely to, exist in the record of an honest election.

The ultimate end aimed at and attained, of course, involved many other and perhaps more grievous offenses against the law than that charged in the indictment. It required the co-operation, not only of the inspectors in the several districts, but also the police and many of the other town officers. The fact that so many public officers were at the same time, in the same way and by the same means, either actively promoting or conniving at a scheme to produce a false result of the election, suggested the presence of some central figure and some controlling mind as the author; and all the circumstances pointed to the defendant as that person. He alone had the power, the means and the motive.

The singular position of power and influence which he held in the town was an important fact in the chain of circumstances. It would be quite tedious to enumerate all the various offices that he held with the important powers attached to them. It is within the limits of the evidence, and sufficient to say that there is scarcely any power of local government that can be exercised in a town, whether administrative or political, that was not concentrated in his person; and even the judicial power, as represented by the local magistrates,

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was subject to his influence. This sufficiently appears by the wholesale arrests of the watchers and other persons on and before the day of the election. In a town which contained such places of resort as Coney Island and Sheepshead Bay private business was centered largely in hotels, saloons, theaters, race courses and other forms of amusement or entertainment, and it was all so far dependent upon police protection and official favors as to add greatly to this power and influence.

He was the superintendent of the Sabbath school of the Methodist church, and seems to have exercised a potent influence upon the religious life of the people. He had been elected supervisor of the town during eight successive terms unanimously. During nearly all this time he controlled the politics of the town. Whatever cause he favored and whoever the candidates that he supported were, the vote of the town was recorded in that way. Whether the election was general or local and whichever of the two great political parties that he supported, the vote was so nearly unanimous that way as scarcely to conceal the fact that it represented in a great degree, at least, the will of a single man. A curious instance of that kind occurred at the presidential election of 1888. Prior to that time he had been attached to the Democratic party, but in consequence of some disagreement with the party organization in the county he supported the Republican candidates that year and they received substantially the unanimous vote of the town. The same result was in a great measure secured in the same way in the two subsequent state elections. In the election of 1893 he was supporting the Democratic candidates, and the circumstances indicated that he was interested and anxious to make this support as effective as possible. The possession of this enormous power for so long a period naturally made him ambitious to retain it and intolerant of all opposition.

Another fact appears which tended to promote the success of the political measures and candidates which he favored. There was really no division of the voters upon party lines. There was in the town, it is true, what was called a Republi-

can organization, as well as a Democratic organization, but the evidence tended to show that the defendant so controlled both that neither was able or willing to make any earnest or effective opposition to his wishes at the polls.

These facts and circumstances, with others appearing in the record, embracing other acts and declarations of the defendant and the acts and declarations of his alleged co-conspirators, or some of them, were all submitted to the jury under a very fair charge, and the verdict must be taken as establishing the truth of the charge, which was the main fact in issue, that the defendant did aid, abet, counsel and advise the inspectors in the misconduct and neglect of duty stated in the indictment.

The exceptions taken at the trial and now urged as ground for reversal remain to be considered. The record contains many that are obviously without merit. It will be necessary to notice only the most important ones that appear upon the briefs of counsel and were discussed at the argument.

Many of these exceptions were taken to proof by the prosecution of acts done or declarations made by others claimed to have been engaged in the alleged conspiracy, but not in the defendant's presence. When a conspiracy is shown, or evidence on the subject given sufficient for the jury, then the acts and declarations of the conspirators, in furtherance of its purpose and object, are competent, and in a case like this it is not necessary, in order to make such proof competent, that the conspiracy should be charged in the indictment. (Roscoe's Crim. Ev. [8th ed.] p. 432; 1 Green. Ev. § 111; 4 Id. § 94; *People v. McQuade*, 110 N. Y. 306; *Smith v. N. B. So.*, 123 id. 85; *Logan v. U. S.*, 144 U. S. 263; *Com. v. O'Brien*, 140 Pa. St. 555; *Queen v. Most*, L. R. [7 Q. B. D.] 244; *People v. Kief*, 126 N. Y. 661; *People v. Bliven*, 112 id. 79; *Spies v. People*, 122 Ill. 1, 224, 228-9.)

The circumstances of the arrest of the persons at the town hall who were in search of the lists or watching the election were admissible since, upon the evidence, they could be attributed to the defendant, at least so far as they transpired in his presence, or so far as the acts were done by his procure-

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ment. That part of the proof which related to the acts of others, co-operating with the defendant and in furtherance of the common purpose, was also competent upon the principle already stated.

Proof was given by the prosecution in regard to the several public positions held by the defendant, the receipt of large sums of money as supervisor and also the sale of liquors by saloons on Sunday. The power that the defendant wielded through public offices or through the receipt and disbursement of large sums of money became, under the circumstances, a proper inquiry. It was not competent to show that he misappropriated the money, and no attempt of that kind was made, but it was admissible only to show that the defendant possessed power and patronage that might probably influence others; and proof of the relations existing between the keepers of saloons, representing a large number of people and extensive business interests, and the chief of police, though, perhaps, somewhat remote, is not, under the circumstances, reversible error.

So, also, it was competent to show the situation of the several election districts and their relation to the town hall, where the registry was made and the votes cast. The incidental fact that the defendant participated in the division as a public officer could not be imputed to him as an offense and the trial court confined its scope to a mere description of the arrangement made by law for registering and casting the vote. In this view the proof was admissible.

The objections to the poll lists given in evidence by the prosecution were not well taken. The alleged conspiracy was without point or motive unless the registry and the vote certified were fraudulent, and hence the poll lists kept by the inspectors and which showed how the vote was made up had a direct bearing on this question. It was for the jury to say whether, under the circumstances, a large fraudulent vote could have been registered and reported without the knowledge or connivance of the inspectors and the defendant. The inquiry as to the number of legal voters actually residing in

the town was also involved in the issue. The defendant himself testified on that subject and claimed they had increased since the vote of previous years, and, therefore, the poll lists of these years had some bearing on the question and the ruling admitting them was not error. This class of evidence could not have been admitted to show that the defendant may have been guilty of some other offense or wrongdoing not charged in the indictment. But if it had a bearing on the issue involved in the trial it could not have been excluded merely because it tended to justify such an inference.

The defendant was a witness in his own behalf at the trial. On cross-examination various questions were propounded to him which were objected to by his counsel and admitted under exception. The scope of the cross-examination was largely within the discretion of the court. The questions related to various official acts in the administration of the affairs of the town and connected with the numerous offices which he held, but they all had some bearing upon the power, influence and patronage that he wielded and the means at his command to influence others, whether individuals or public officials. Some of the questions called for a description of the position which he held in politics and his ability to influence and control the action of both political organizations. It was proper to give the jury as clear an idea as was possible of the defendant's political power and of his ability to influence whatever result he desired at elections, and for that purpose the questions were admissible within the limits of a reasonable discretion.

The defendant gave proof of his good character by some of the most prominent business men in the county. He was evidently what might be termed a popular man, who had many friends. He had the power to retain them and to increase their number. Those witnesses testified that his reputation was good. On cross-examination various questions were asked and answered under objection and exception with respect to his political power and influence, or rather what the witnesses had heard on that subject from the speech of people. It may have been improper to prove the defendant's position

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in that way as an affirmative fact. But there was really no question about the defendant's great power, and it does not appear that the evidence was received for that purpose. The defendant having made reputation a subject of inquiry, the People had the right to put before the jury just what that reputation was, though it included the ability to influence and control elections.

The People called a witness who testified that when the registry lists were nearly completed he went to the town hall, the place where they were by law required to be kept, and there found a man in charge, who by his dress he assumed to be a policeman, and told him that he wanted to see the lists in order to make copies, stating fully his purpose and who had sent him. The person in charge told him that he could not see the lists without an order from defendant. It must be remembered that the defendant as head of the police had charge of the hall, and it was competent for the prosecution to prove the efforts made to see and copy the lists and the failure of these efforts. What the person in charge said was a part of this proof and at least tended to show that the application was not successful. But even if his statements were objectionable they were subsequently made competent by proof of the defendant's admissions that he was acting under his orders. The prosecution called another witness and proved by him that he served an order of the court, in the proceedings to obtain access to the several lists, upon the chairman of the board in the first district, and he was permitted to state also what he said to him at the time of making the service. This was proper. What was said to the chairman at that time in regard to the purpose of the service was notice to him that the lists were required and part of the *res gestæ*. But the witness went further and testified that he also said to him that he had just served a like paper on another member of the board and that that member said he was going to hand the papers to the defendant. This was inadmissible, but it was a voluntary statement of the witness, not called for by the real spirit or purpose of the question, and under a rule which the

court had adopted in the course of the trial in presence of all the counsel, it would have been stricken out had a motion for that purpose been made. In the absence of such a motion the defendant cannot complain that the statement was injurious.

A witness for the People testified to very important declarations made by the defendant to him in a conversation through the telephone. A proper objection was made and exception taken. It appeared that the witness did not then know defendant or recognize his voice. In the absence of some other proof this exception would have been good. (*Murphy v. Jack*, 142 N. Y. 215.) But the witness further testified that he heard an affidavit made by defendant, and read in his presence, in which he stated that he had the conversation by telephone with the witness and that there was but one. This statement was made without any objection that the affidavit itself was the best evidence of what it contained, and was in fact drawn out by defendant's counsel. Subsequently the affidavit was put in evidence by the defendant, and when on the stand he gave his version of the same conversation which differed from that of the witness, the other party to it. The objection was in this way cured and the conversation was properly in the case.

It appeared that Michael Ryan was an inspector for the second district and principal of the school at Coney Island, having under his charge six other teachers. One of these teachers was called who testified for the People to the effect that Ryan was absent for three days prior to the election during the struggle to obtain access to the registry lists, and she also gave some testimony tending to show the number of scholars in the school. The evidence was received under defendant's exception. Of course this testimony had no bearing whatever upon the question of the true number of legal voters in the town, and there is nothing to show that it was offered or received for such purpose. Ryan, being a member of the registry board, was one of the alleged conspirators. The fact that he was absent at that particular time, when he had

important duties to perform at the school, was a circumstance though perhaps somewhat remote, proof of which cannot be said to be error prejudicial to the defendant.

There are many other exceptions in the record, but they are all covered by the views expressed in regard to those already specifically noticed and do not require further consideration.

While we have discussed the questions thus raised at some length it is proper to say that many of them fall within the statute which directs this court to give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties. (Code Crim. Pro. §§ 542, 684.)

We have examined the case in view of the fact suggested by the learned counsel for the defendant that the trial took place in the midst of great public excitement. This was perhaps to be expected from the character of the events which took place at and just preceding the election and the disclosures which followed. The situation, doubtless, demanded the application at the trial of all the safeguards which the law interposed for the protection of the defendant's rights, and it is evident from a careful examination of the case that they were all guarded with vigilance and sedulous care. The case was peculiar and the mode adopted for proving the charge somewhat unusual. While in theory and in law there can be no objection to proving a crime by proof of a conspiracy to commit it, yet, in practice, that method of establishing the issue is liable to give the prosecution an undue advantage. Neither the scope, limits or purpose of the alleged conspiracy, nor the actors in it, are accurately defined by any pleading in the case, and the accused has to meet at the trial a multitude of inculpatory facts claimed to be relevant to the main fact in issue. There is always danger in such cases that the specific charge will be lost sight of and disappear in the mass of collateral facts growing out of other subjects, and that the defendant may be convicted because of other wrongdoing with which he was not charged.

But we think that in this case the learned trial judge kept

the real issue constantly and clearly before the jury in the rulings and in the charge. He gave them very clear and careful instructions with respect to the nature and character of the circumstantial evidence which the law required in order to prove the main fact. They were instructed to acquit the defendant unless satisfied beyond a reasonable doubt that he counseled, advised, aided, abetted or procured the inspectors of the first district to do or omit to do the things charged against them in the indictment, even though satisfied that he did advise and procure the inspectors of any or all the other districts to neglect the duty imposed upon them by the statute. And further, that unless the identical charge against the defendant contained in the indictment was established, beyond a reasonable doubt, he should be acquitted, though the evidence in the case might show, or tend to show, some other violation by him of the law, and that the facts and circumstances adduced were to be considered only so far as they had a bearing upon or were relevant to prove the main fact charged. The jury could not have been misled as to the real issue or as to the nature and quality of the circumstantial evidence required to sustain it on the part of the People.

The appeal presents no substantial question that would justify this court in interfering with the verdict, and the judgment must, therefore, be affirmed.

All concur.

Judgment affirmed. _____

JOHN B. M. STEPHENS, as Receiver, etc., Appellant, v. MARY J. PERRINE et al., Respondents.

A failure to file a chattel mortgage, where there is no change of possession of the mortgaged property, renders it void as to then existing creditors of the mortgagor, and the mortgagee cannot thereafter acquire title to property by taking possession and selling the same under the mortgage and bidding it off on the sale, and this, although the mortgage was given in good faith to secure an actual indebtedness.

A receiver appointed in proceedings supplementary to execution may maintain an action against the mortgagee who has thus taken possession of and sold the mortgaged property, to recover the same or its value.

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| 148 | 476 |
| d158 | 109 |
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| j160 | 187 |
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It seems, a bona fide transfer of the property by the mortgagor to the mortgagee, in payment of the mortgage debt, before a creditor has obtained judgment and execution or any lien upon the property, will give a good title to the mortgagee and so defeat the creditor's right to assail the mortgage.

Karl v. Gans (186 N. Y. 816); *Mandeville v. Avery* (124 id. 376); *Tremaine v. Mortimer* (128 id. 1); *Wheeler v. Lawson* (103 id. 40); *Kitchen v. Lowery* (127 id. 53), distinguished.

Stephens v. Perrine (69 Hun, 578), reversed.

(Argued November 1, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 23, 1893, which reversed a judgment in favor of plaintiff entered upon the report of a referee and granted a new trial.

This action was brought to set aside a chattel mortgage, and to recover the property covered by it or its value.

In February, 1892, the defendants Frank Aldrich and Charles W. Perrine composed the firm of Frank Aldrich and Co., and on the 25th of that month they gave a chattel mortgage on personal property owned by them, and then in their possession, to the defendant Mary J. Perrine, for the purpose of securing to her the payment of something over \$2,000 then loaned by her to the firm. The mortgage was not filed until March 30th, 1892, on which day it was filed in the Monroe county clerk's office. The omission to file was intentional. The mortgaged property remained in the possession of the mortgagors until the 30th of March, 1892, when the mortgagee took possession of it under her mortgage, and, after advertisement, the property was sold, and the mortgagee became the purchaser as the highest bidder at the auction sale. The mortgage was made without any fraudulent intent on the part of the mortgagors, and it was received by the mortgagee to secure a valid indebtedness, and without any intent to defraud on her part.

Prior to and at the time of the execution of this mortgage the mortgagors were indebted to many other people, and among them to Redfield and Sons, and also to Hill Bros. & Co.

Subsequent to the date of the filing of the chattel mortgage, and the taking possession of the property by the mortgagee, the creditors above mentioned commenced separate actions against the mortgagors and recovered judgments therein subsequent to the sale of the mortgaged property by the mortgagee under her mortgage. Executions were issued upon these judgments and returned wholly unsatisfied, and the plaintiff was subsequently appointed receiver in proceedings supplementary to execution based upon such judgments. Before the commencement of this action the plaintiff demanded of the defendants the delivery to him of the property covered by the chattel mortgage or payment of the value thereof, which was refused. This action was thereupon commenced to set aside the mortgage and to recover the property or its value. Some claim was made on the part of the plaintiff that the mortgage was executed for the purpose of defrauding creditors, but the referee found against the plaintiff on that issue. He gave judgment for the plaintiff on the ground that the failure to file the mortgage or to deliver the possession of the property to the mortgagee at the time of the execution of the mortgage rendered it void as against the creditors represented by the plaintiff, and the referee further held that the plaintiff as a receiver in proceedings supplementary to execution could maintain this action. The General Term reversed this judgment and the plaintiff has appealed to this court.

Albert H. Harris for appellant. The chattel mortgage was void as against creditors for want of filing. (Laws of 1883, chap. 279, § 1; *Karst v. Gane*, 136 N. Y. 316; *Vreeland v. Pratt*, 42 N. Y. S. R. 583.) The plaintiff had the right to reach the avails of the property after Miss Perrine had sold it under her mortgage. (*Karst v. Gane*, 136 N. Y. 316; *Stimson v. Wrigley*, 86 id. 332; *Dutcher v. Southwood*, 15 Hun, 31; *Parshall v. Eggert*, 54 N. Y. 18; *Q. & N. B. Co. v. Hart*, 48 Hun, 393.) The plaintiff, as receiver in supplementary proceedings, can maintain this action. (*Mandeville v. Avery*, 124 N. Y. 385; *Porter v. Williams*, 9 id.

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142; *Underwood v. Sutcliffe*, 77 id. 58; *Becker v. Torrance*, 31 id. 631; *Bostwick v. Menck*, 40 id. 383; *Wright v. Nostrand*, 94 id. 31; *Perkins v. Stimmel*, 114 id. 359; *Gillett v. Moody*, 3 id. 479; *Rodman v. Henry*, 17 id. 484; *Kennedy v. Thorpe*, 51 id. 174; *Osgood v. Laytin*, 48 Barb. 463; 5 Abb. Pr. [N. S.] 9; *Manley v. Rassiga*, 13 Hun, 288; *Teller v. Randall*, 40 Barb. 242; *Field v. Sands*, 8 Bosw. 685; *Parker v. Browning*, 8 Paige, 388; *Donnelly v. West*, 17 Hun, 564; *Rudd v. Robinson*, 54 id. 347; *Dunham v. Byrnes*, 36 Minn. 106; *Hamlin v. Wright*, 23 Wis. 492; *Barker v. Dayton*, 28 id. 367; *Olney v. Tanner*, 10 Fed. Rep. 101, 113; *Miller v. Makenzie*, 29 N. J. Eq. 292; *Whitlessey v. Delaney*, 73 N. Y. 571; *Atty.-Gen. v. Ins. Co.*, 77 id. 272; *Palen v. Bushnell*, 18 Abb. Pr. 301; High on Receivers, 454.)

William B. Hale for respondent. The plaintiff, being a receiver of the mortgagors in supplementary proceedings, cannot maintain an action to set aside a mortgage made by them on the ground that the mortgage was not filed. (*Steward v. Cole*, 43 Hun, 164; *N. C. N. Bank v. Lord*, 33 id. 557; Laws of 1883, chap. 279, § 1; *Becker v. Torrance*, 31 N. Y. 631; *Bostwick v. Menck*, 40 id. 383; *Wright v. Nostrand*, 94 id. 31; *Underwood v. Sutcliffe*, 77 id. 58.) No cause of action exists against the defendants. (*Thompson v. Van Vechten*, 27 N. Y. 568; *Button v. R., S. & Co.*, 126 id. 187; *Hale v. Sweet*, 40 id. 97; *Tremaine v. Mortimer*, 128 id. 1; *Kitchen v. Lowery*, 127 id. 53.)

PECKHAM, J. The single question argued here has been which of these parties upon the foregoing facts is entitled to judgment. At the threshold of an examination of the subject it may be stated that this mortgage was void as against those creditors who were such at the time it was executed, although at that time they had obtained no judgments in their favor and then stood in the condition of simple contract creditors.

The failure to file the mortgage, there being no change of

possession of the property mortgaged, rendered it void as against creditors then existing. (Laws of 1833, sec. 1, chap. 279; *Karst v. Gane*, 136 N. Y. 316.)

The Supreme Court has reversed the judgment for plaintiff upon the ground that although such mortgage was void even as to existing creditors, yet as the mortgagee filed her mortgage, and under it took possession of the property mortgaged and sold the same by virtue of it before the creditors represented by the plaintiff had obtained any lien on the property by judgment and execution or by some other legal process, the mortgagee had the right to hold such property or its proceeds against these creditors. The court stated that the creditors, in order to take advantage of this void mortgage by reason of a failure to file it, must not only acquire a lien upon the property by virtue of a levy or other legal process, but such lien must be had before the mortgagee has reduced the property to possession and sold it to satisfy his claim.

In this holding we are of the opinion the court below erred. The mortgage, as to the creditors of the mortgagor, was always void. It continued to be void notwithstanding the fact that the mortgagee assumed to take possession under and to sell the property by virtue of such void instrument. As between these mortgagors and creditors, it was the same as if the mortgage did not exist, and the mortgagee could not, as against these creditors, obtain any rights under it. How could a mortgagee in a void mortgage as against creditors obtain any title to property by virtue of such mortgage? As against them the mortgagee could not rightfully take the property by virtue of this void instrument, and if she did take it in spite of the fact that the mortgage was void and no protection to her, how could she secure any further or greater right by the sale of the property and the receipt of its value? This action is against the mortgagee, and I cannot see the force of the reasoning which, while admitting that the mortgage is void as to creditors, nevertheless asserts that a title to the property covered by it may be obtained by the mortgagee by proceedings taken under it and which assert the validity

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of such instrument, provided they are taken before the creditors are armed with a judgment and execution so as to enforce their rights which rest upon the invalidity of the mortgage. If void, what right has the mortgagee, as against creditors, to take possession in her character of mortgagee and to sell or dispose of property described in it? Clearly she has none, and she does not acquire any by the celerity of her movements in seizing and selling property under it.

Although in order to themselves take the property it was necessary for the creditors to have some legal process, yet, when that condition was complied with, their right to take it as between these parties became perfect.

If, before any lien had been acquired by the creditors, the mortgagors had delivered the property to the mortgagee in payment of her debt, she could have then held it because it would have been in such a case a transfer of property by them in payment of their debt, and although it would have been in fact preferring such debt, yet it would have been a preference which the mortgagors then had the right to make.

But in this case there was nothing of the kind done. The mortgagee acted under and by virtue of her mortgage all the time. The mortgagors did not deliver the property to her in payment of her debt. She took it under the assumed right given by the mortgage.

The language of Ch. J. ANDREWS in *Karst v. Gane* (*supra*) gives no countenance to the claim made in this case. He there said: "The simple contract creditor runs the risk of having his remedy to assail the mortgage defeated by a *bona fide* transfer of the property by the mortgagor to the mortgagee in payment of the mortgage before he has obtained judgment and execution or any lien on the property." This statement is perfectly true, but is no justification for the claim that the mortgagee can herself defeat these creditors by taking possession of the property under a mortgage which as to them is non-existent.

The case of *Mandeville v. Avery* (124 N. Y. 376) is to this same effect. The court in that case speaks of the mortgage as

fraudulent, and that, therefore, all proceedings under it were void, and that as the mortgagee took possession of the property under such mortgage and caused the property to be sold under it, he could not hold the property or the proceeds of the sale thereof as against a pursuing creditor in regard to whom the mortgage was void. The defendants herein seek to distinguish that case from this, because the mortgage in the case cited was fraudulent, and, therefore, void, while in this case there was no fraudulent intent and the mortgage was only void because made so by statute. The two different causes which make the mortgages in these two cases void work no difference in the result which follows from their illegality. The material fact is that the mortgage is void in each of the two cases as against creditors, and the result which flows from that fact, no matter which of the two causes may be the ground of invalidity, is that the mortgagee can acquire no right as against the creditors of the mortgagor based upon the enforcement of her mortgage by taking possession of and selling the property under it.

In *Tremaine v. Mortimer* (128 N. Y. 1) the same principle is maintained, and Judge EARL, in the course of his opinion, says, in substance, that the mortgagor in a mortgage which has not been filed may, as between himself and his creditors, treat the mortgage as if it did not exist, and before the creditors obtain a lien on the property he may deal with it in any honest way; he may sell it or assign and transfer it and give an absolute title, or he may deliver the property to the mortgagee in payment of his debt. There is no hint, however, either in the facts of that case or in the opinion of the court that the mortgagee in such a mortgage can enforce it as against creditors if only he succeed in obtaining possession of and selling the property under it before the creditors obtain their lien. The counsel for respondents has also cited the two cases of *Wheeler v. Lawson* (103 N. Y. 40) and *Kitchen v. Lowery* (127 id. 53) as authority for his argument.

We have carefully read those cases and we think neither applies here. It will be seen, upon a perusal of the facts,

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that it was the act of the mortgagor, by his general assignment in each of the cases made subsequent to the making of the mortgage, which transferred the title and caused the decisions in those cases. There is nothing in either of them that I can see which affords any foundation for the claim that the mortgagee can obtain any superior right over creditors by taking possession of and selling the property under the void mortgage.

If we are right in this view of the case the defendant nevertheless claims that the plaintiff, as receiver in proceedings supplementary to execution, cannot maintain this action. We think he can. (*Porter v. Williams*, 9 N. Y. 142; *Mandeville v. Avery*, 124 id. 376, and cases cited.)

It has been decided by this court that such a receiver can maintain an action of this nature where the assignment or mortgage is void on the ground that it was executed for the purpose of defrauding creditors, and we think the same principle reaches the case where the mortgage is void because it was not filed and there was no change of possession. (Cases above cited.) We see no distinction between the two cases so far as this question is concerned. The mortgage, as already stated, is equally void in both cases, and a receiver in supplementary proceedings represents the creditors, or, in other words, is trustee for them just as much when the mortgage is void on the ground of the failure to file it as when it is void because executed with a fraudulent purpose. The case of *Underwood v. Sutcliffe* (77 N. Y. 58) has, plainly, no bearing upon this point.

We think the defendants failed to make out any defense to this action, and, therefore, the order of the Supreme Court should be reversed and the judgment entered upon the report of the referee affirmed, with costs in all courts to the plaintiff.

All concur.

Judgment accordingly.

JOHN J. P. READ, Respondent, v. LOUIS KNELL, Impleaded,
etc., Appellant.

An assignment of a mortgage by an administrator of a deceased mortgagee to a third person, and by the latter to the administrator individually, is not void, but voidable at the election of the next of kin of the intestate; and so, in an action by the administrator, in his own name as owner, to foreclose the mortgage, the mortgagor and his successors in interest may not controvert plaintiff's title.

In such an action the defendants pleaded a defect of parties, in that the next of kin of the deceased mortgagee were not made parties. It appeared that the only next of kin were plaintiff and a sister who died without issue. It was claimed that she married and left a will. The alleged will was admitted to probate, but the surrogate's decree was reversed by the General Term, and the questions involved were sent to a jury for trial. At the time of the trial of the action these questions remained undisposed of, and no executor or administrator of the deceased sister had been appointed. The Special Term made no findings under the plea of defect of parties, but dismissed the complaint on the ground that the assignment of the mortgage was void. The General Term reversed the judgment and ordered a new trial without passing upon the question as to parties. Defendants appealed from the order giving the required stipulation. *Held*, that an order of affirmance and for judgment absolute on the stipulation was proper.

Reported below, 69 Hun, 541.

(Argued November 1, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 29, 1893, which reversed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term which granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Adelbert Moot for appellant. Plaintiff's complaint was properly dismissed by the trial court. (Code Civ. Pro. §§ 446, 447, 448, 449, 452; *Simpson v. Satterlee*, 64 N. Y. 657; *Sherman v. Parish*, 53 id. 483; *Van Epps v. Van Dusen*, 4 Paige, 64.)

Edmund P. Cottle for respondent. The court at Special Term erred in deciding that the assignments were void as against the defendants, who had no interest in the estate of Elizabeth Read. Louis Knell had no interest entitling him to question the acts of the administrator. (Perry on Trusts, § 205; *Forbes v. Halsey*, 26 N. Y. 65; *Harrington v. Brown*, 5 Pick. 519; *Andrews v. Durane*, 18 N. Y. 496; *Jennison v. Hapgood*, 7 Pick. 1; *Hawley v. Cramer*, 4 Cow. 719; *Ward v. Smith*, 3 Sandf. Ch. 592; *Baker v. Read*, 18 Beav. 398; *Musselman v. Eshelman*, 10 Barr, 394; *Bell v. Webb*, 2 Gill, 164; *Todd v. Moore*, 1 Leigh, 457.) The plaintiff is the real party in interest. (*Sheridan v. Mayor, etc.*, 63 N. Y. 30; *Morris v. Tuthill*, 72 id. 575; *Peterson v. C. Bank*, 32 id. 21.) The court at the trial term did not pass upon any other question than the validity of the assignments. If its decision on that point was erroneous then the judgment was properly reversed and a new trial granted, and the decision of the General Term should be affirmed and judgment absolute given for the plaintiff. (*Lake v. Nathans*, 67 N. Y. 589; *Godfrey v. Moser*, 66 id. 250.) The question as to whether representatives of E. A. S. Read-Rockwell were necessary parties or not, is not one necessary to be considered on this appeal. (Code Civ. Pro. § 723.) There was no sufficient plea in respect to a defect of parties. For a successful plea in abatement, the plea must show that there is some person living who is entitled to be joined. (1 Chitty on Plead. 452; *Donovan v. Clark*, 76 Hun, 339; *People v. Keyser*, 28 N. Y. 226.) As the holder of the mortgage, the plaintiff might sue alone, even though he held the mortgage in part for the benefit of another. It is a contract running to him; he sues upon the mortgage and recovers on it. (Code Civ. Pro. § 449.) The court may determine the controversy as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights. (Code Civ. Pro. § 452.) The plaintiff is administrator of Elizabeth Read's estate, has given security for its assets, and if there were any one but himself interested in it,

he would be equally accountable for the value of the estate that came to his hands whether he assigned the mortgage or collected it as an individual or as administrator. No one is prejudiced or defrauded by either course. (*In re Pruyn*, 114 N. Y. 544.) Defendant has nothing to do with the good faith of the assignment or the effect of it upon the rights of others. The assignor was, as to the defendant, the legal owner of the mortgage; he is estopped by his assignment from denying its validity, and the defendant will be protected in paying to the assignee under a judgment in his favor. (*Sheridan v. Mayor, etc.*, 68 N. Y. 32; *Peterson v. C. Bank*, 32 id. 1; *Morris v. Tuthill*, 72 id. 575; 35 Hun, 544.)

FINCH, J. The plaintiff brought this action to foreclose a mortgage upon the premises described in his complaint. The mortgage was originally given by one Ambruster to Elizabeth Read to secure the payment of seventeen hundred dollars, and the mortgagor thereafter conveyed the land to the defendants Knell and wife. Elizabeth Read died intestate, and the plaintiff was duly appointed administrator of her personal estate. As such and in his official character he assigned the mortgage to a third person, by whom it was at once assigned back to the plaintiff as an individual, and he in due season brought this action in his own name as owner of the mortgage and not in his official character. Upon that circumstance the Special Term founded its decision which resulted in a dismissal of the complaint. The ground asserted was that such a transfer from an administrator to himself as an individual was absolutely void, and so the plaintiff had no title to the mortgage which he sought to foreclose. The General Term reversed the judgment for that error, holding that the assignment was not void, but merely voidable at the election of the next of kin of the intestate, and that the mortgagor and his successors had no such election and could not themselves controvert the title of the plaintiff. The conclusion of the General Term was a correct statement of the law. *Hawley v. Cramer*, 4 Cow. 719; *Forbes v. Hulse*, 26 N. Y. 65; *Harrington v.*

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Brown, 5 Pick. 519.) Indeed, on this appeal, I do not understand the learned counsel for the appellant to argue to the contrary, or to defend the abstract rule asserted by the trial court which made the assignment absolutely void even as against the mortgagor. What is asserted appears to be that the dismissal of the complaint was justifiable, although the assignments are regarded as merely voidable, because of a defect of parties both pleaded and proved. The argument is that since the next of kin of Elizabeth Read might avoid the transfer, they became necessary parties to the foreclosure, which could not proceed without them. There are several answers to this claim. It appears that Mrs. Read, the original mortgagee, left as her only next of kin the present plaintiff and a sister, who died without issue, but is asserted to have been married to one Rockwell and to have left a will. Whether she was so married and whether she left a valid will are questions now being litigated in the courts. The surrogate admitted the alleged will to probate, but the General Term reversed the decree and sent the questions involved to a jury for trial. There have been two such trials resulting in a disagreement, and there is no executor or administrator of the sister who could be brought in. Beyond that, the Special Term proceeded on no such ground, but upon one which made that question totally immaterial and cut off wholly the right of the party, if the court should so determine, to bring in Rockwell on account of his claimed interest in the property. The General Term did not decide the question whether there was or was not a defect of parties, but left that open as a question to be litigated upon the new trial which it ordered. Instead of taking the new trial, and raising the question of parties when for the first time it became material and securing a ruling thereon or an order bringing in Rockwell, the defendants took this appeal, giving a stipulation for judgment absolute. There is no finding that the sister is living, or that she has any representative whatever, because under the view taken by the Special Term the inquiry did not arise and was not considered. It is quite clear,

therefore, that the General Term were right in reversing the judgment and sending the case back for a trial conducted upon correct principles, but without passing upon any possible defense which, under the pleadings, the defendants might have a remaining right to interpose.

The order should be affirmed, with costs, and judgment absolute be awarded against the defendants appealing upon their stipulation.

All concur.

Ordered accordingly.

HARRIET A. FRANCISCO, Respondent, v. CHARLES A. SMITH,
Appellant.

An agreement by the vendor, upon sale of a business and its good will, that he will not engage in a similar business in the same place for a period specified, is legal and valid and will be enforced by a court of equity.

Such an agreement is a valuable right in connection with the business it was designed to protect, and may be assigned by the purchaser upon a sale by him of the business, and the assignee may enforce it the same as the assignor could have done had he retained the business.

Defendant, who, in February, 1888, was carrying on the business of baker and confectioner in Little Falls, in that year sold the business, its good will and the property in his place of business to F., the husband of plaintiff, agreeing that he would not, for the period of five years from May first of that year, carry on that business in said village. F. carried on the business until November 10, 1889; he had given a chattel mortgage on a portion of the property, and on November 9, 1889, he gave a bill of sale to the mortgagees of all the property connected with the business; they, on the next day, by virtue of the mortgage and bill of sale, took possession of the property, closed the store and kept it closed until November nineteenth, when plaintiff, her husband acting as her agent, purchased the interests of said mortgagees, took possession, re-opened the store and thereafter carried on the business. Immediately prior to such purchase, plaintiff, with her husband, agreed that she would furnish the money to make the purchase and that he would take charge of and carry on the business in her name, the family to be supported out of it. On May 25, 1891, F., by an instrument in writing indorsed on the contract between him and defendant, in form transferred to plaintiff, without any actual consideration paid, all his interest in the contract and the covenants therein, the business formerly carried on by

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him and the good will. In December, 1890, defendant, without consent of plaintiff or her husband, commenced carrying on a similar bakery and confectionery business in said village. *Held*, that an action was maintainable by plaintiff to restrain defendant from carrying on such business and for damages.

Reported below, 67 Hun, 225.

(Argued November 1, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 7, 1893, which reversed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term and ordered a new trial.

This action was brought to restrain defendant from carrying on a bakery and confectionery business in the village of Little Falls, and to recover damages for the violation of a contract not to engage in such business during five years from March 1, 1888.

Prior to the 20th day of February, 1888, the defendant carried on the business of baker and confectioner in Little Falls, and on that day he sold to Frank E. Francisco his business and the good will thereof, together with the property contained in his place of business, and agreed with him that he would not, for the period of five years from the 1st day of March then following, engage or become interested in the business of a baker or confectioner in that village. Mr. Francisco went into possession of the business on the 1st day of March, and carried it on at the same place until the 10th day of November, 1889. On the 27th day of February, 1889, he gave to Clark & Wood, of Fort Plain, a chattel mortgage on certain property connected with the business to secure money then loaned and a prior indebtedness; and on the 9th day of November, 1889, he gave them a bill of sale of the property mentioned in the mortgage and all the other property connected with his business; and on the next day they, by virtue of the mortgage and the bill of sale, took possession of the property and store and closed the store and took part of the property to Fort Plain, and remained in possession

of the property, and kept the store closed until November 15th, 1889, doing no business whatever there. On the latter date the plaintiff, by her husband, Frank E. Francisco, as her agent, purchased from Clark & Wood all their interest in the mortgage and the property covered thereby, and all the property covered by the bill of sale, except some groceries and outside property, and paid them therefor. Immediately after such purchase she took possession of the store and bake shop and the tools, fixtures and appliances therein contained, and the property therewith connected while her husband carried on the business, except as above mentioned, and at once re-opened the store and bake shop, and carried on therein the bakery and confectionery business and commenced selling the same kind of goods and to substantially the same customers as her husband had been selling, using the same tools and fixtures. On the same day and immediately prior to such purchase by her it was verbally agreed between her and her husband that she would furnish the money to make the purchase, and that he should take charge of the business and carry it on in her name, and that his family, consisting of the plaintiff, a son and himself, should be supported out of the business. He was a practical baker and she was not. He continued to manage the business and his family was supported from the proceeds thereof. On the 25th day of May, 1891, he, by an instrument in writing, indorsed upon the contract of February 20th, 1888, between him and the defendant, in form transferred to her, without any actual consideration paid, all his interest in the contract and all claims and demands therein, and all covenants therein contained, and all breaches thereof, and the business formerly carried on by him and the good will thereof. About December 15th, 1890, the defendant, without the consent of the plaintiff or her husband, commenced carrying on a bakery and confectionery business at Little Falls like that which he had sold to the plaintiff's husband, and continued to carry on the same to the commencement of this action, and thereby injured the business of the plaintiff.

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Statement of case.

December 18th, 1890, Mr. Francisco served notice on the defendant, notifying him that he was violating his contract of February 20th, 1888, and requiring him to discontinue his business; and May 25th, 1891, the plaintiff served on him a similar notice, notifying him that she was the owner of his contract and of the business purchased of him by her husband. The defendant persisted in carrying on the business, and thereafter the plaintiff commenced this action to restrain him, and to recover damages for the violation of his contract with her husband. The defendant put in issue the plaintiff's title to the contract and to the agreement of the defendant, therein contained not to carry on the business sold to her husband. The action was brought to trial at a Special Term, and the trial judge decided that issue in favor of the defendant, and dismissed the complaint. From the judgment entered upon his decision the plaintiff appealed to the General Term, and there the judgment was reversed and a new trial granted, and then the defendant appealed to this court.

John D. B. Starbuck for appellant. A covenant not to compete in business or will only be enforced at the suit of a party who has had an interest intended to be protected by it and which business until the protection which its enforcement will afford. *May 25th, 1 v. Gregory*, 10 N. Y. 241-243; *D. M. Co.* prevented him *id.* 473-482; *Chappell v. Brockway*, 21 *Wass*, and then *Hillman v. Dwight*, 13 *Gray*, 356; *Hubbardment*. But see *Mich.* 15; *Mandeville v. Harmon*, 7 *Atl. Rep.* property, tools and *in v. C. J. R. & U. S. Y. Co.*, 23 *id.* 287 was in possession not to compete in business, or, as they are some carried on by contracts and agreements in restraint of trade. At that date assigned except with the business in aid of which will thereof, an agreement was entered into by the parties thereto. (*D. ment*, and thus, 106 N. Y. 473-487; *Hodge v. Lowe*, 47 *low* led to all the benefits *v. Rochester*, 56 *Penn. St.* 194; *Guenard v. Lig* the conceded 61; *C. S. N. Co. v. Wright*, 6 *Cal.* 258; *Kidless* together, and 10 *U. S.* 614.) The General Term had no authority what is there in objection to review the questions of fact

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same, and thereby injured

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Opinion of the Court, per EARL, J.

EARL, J. It is unquestioned that the agreement entered into by the defendant not to engage in the bakery and confectionery business in Little Falls during the period of five years was legal and valid, and that courts of equity will enforce such agreements for the protection of the business to which they relate. Such an agreement is a valuable right in connection with the business it was designed to protect, and going with the business it may be assigned, and the assignee may enforce it just as the assignor could have enforced it if he had retained the business. (*Diamond Match Co. v. Roeber*, 106 N. Y. 473.) The agreement can have no independent existence or vitality aside from the business. If Mr. Francisco had not disposed of the business, and had not himself carried it on, there would have been nothing for the agreement to operate upon—no grounds for equitable relief against a breach thereof, or for recovery in an action at law of anything except possibly nominal damages. He would not have lost the benefit of the agreement by omitting, for any definite time during the five years, to carry on the business. The agreement would stand for his protection at any time when he resumed or entered upon the business. It may be assumed, and indeed it is conceded, that he retained the business until he made the assignment to the plaintiff, May 25th, 1891. At that date there was nothing which prevented him from resuming and carrying on the business, and then having the full benefit of the defendant's agreement. But before that date the plaintiff had purchased the property, tools and fixtures connected with the business, and was in possession of the place where the business had been carried on by the defendant and subsequently by her husband. At that date he assigned to her the business and good will thereof, and all his rights under the defendant's agreement, and thus she took his place and became fully entitled to all the benefits of the agreement. Mr. Francisco having the conceded right to sell all the property and the business together, and to assign the agreement at the same time, what is there in reason or principle that precludes him

from first disposing of the property and place of business, and afterward selling and assigning to the same person the business and the good will thereof, together with the agreement made for the protection of the business? We can perceive nothing. The assignment of the agreement goes with and is connected with the business as much in the one case as in the other.

But still further. Before the 25th day of May, 1891, the wife owned the property connected with the business and the husband was carrying on the business in her name, largely for his benefit — that is, he and his family were to be supported out of the proceeds thereof. Thus he had a real interest in the business carried on, and we see no reason to doubt that he had such an interest as entitled him to enforce the agreement in his own name for his own protection. Under such circumstances he could assign the business and the good will thereof, together with all his rights under the agreement to the plaintiff, and by such assignment she became entitled to and occupied the position acquired by him by his purchase from the defendant, and to the protection of his agreement.

There is, therefore, nothing unreasonable in the claim of the plaintiff to enforce the agreement, and there can be no objection to the jurisdiction of a court of equity to protect her against the violation thereof.

It follows that the order of the General Term should be affirmed and judgment absolute be given against the defendant, with costs.

All concur.

Judgment affirmed.

ANN E. SMITH, Appellant, v. MARK T. FERRIS, Impleaded,
etc., Respondent.

Defendant F., being the owner of a bond, conditioned for the payment of \$4,000 in \$100 annual payments, secured by mortgage, assigned them to plaintiff, indorsing on the mortgage a guaranty of payment according to its terms until the same should be reduced to \$3,000. The mortgage provided that the mortgagor should keep the buildings on the premises insured for the benefit of the mortgagee to the amount of \$1,000. Such an insurance was obtained. Subsequent to the assignment the buildings were burned; \$1,434 was paid on the insurance and received by plaintiff. In an action to foreclose the mortgage a judgment for any deficiency was asked against F. upon his guaranty, to the extent of his liability thereon. *Held*, that the guaranty contemplated a reduction of the mortgage by payments thereon made in the usual course according to its terms; that insurance money received was not such a payment, it being simply a substitution *pro tanto* for the mortgaged property and a reduction of the mortgage by application thereon of the substituted fund; and, therefore, that plaintiff was entitled to the relief sought.

Smith v. Ferris (70 Hun, 445), reversed.

(Argued November 2, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 8, 1893, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granted a new trial.

This action was brought for the foreclosure of a mortgage executed by the defendant Michael J. Varley to one Frank T. Ferris, and assigned by him to the defendant Mark T. Ferris, who assigned to plaintiff with a guaranty set forth in the opinion, wherein the facts, so far as material, are stated.

I. W. Wiswall and *J. L. Henning* for appellant. The assignment of the bond and mortgage carried with it to the plaintiff all the rights which Ferris had to receive the insurance money, provided for by the terms of the bond and mortgage themselves, and the guaranty made by Ferris as a consideration for the transfer was entirely unnecessary to give

the plaintiff any benefit from that source. (*Mead v. Parker*, 41 Hun, 577; *Gates v. McKee*, 13 N. Y. 232; *Cris v. Burlingame*, 62 Barb. 357; *Springsted v. Sampson*, 32 N. Y. 703; *Evansville v. Kaufman*, 93 id. 273-280; *M. Co. v. Padrian*, 142 id. 210.) The guaranty of the payment of the mortgage, although it does not in words guarantee the payment of the bond, yet the intention of the parties was, that the debt represented by the mortgage should be guaranteed, and effect should be given to their intentions. (*Stillman v. Northrup*, 109 N. Y. 478-481.)

D. E. Wing and *L. B. Pike* for respondent. The construction of a contract should be most favorable to the guarantor, and it cannot be extended as to him beyond his express undertaking. (*Ward v. Stahl*, 81 N. Y. 406; *McCluskey v. Cromwell*, 11 id. 593, 598.)

ANDREWS, Ch. J. The defendant, Mark T. Ferris, who by assignment had become the owner of the bond and mortgage, sold and assigned the same to the plaintiff, executing at the same time a guaranty to the purchaser, indorsed on the mortgage, as follows: "I hereby guarantee the payment of the within mortgage according to its terms until the same is reduced to three thousand dollars." The bond and mortgage was conditioned for the payment of \$4,000, in sums of \$100 of principal annually, together with interest on the whole sum unpaid, with the privilege to the mortgagee to pay any additional sum on the principal, when any payment became due. The mortgage further provided that the mortgagor would keep the buildings on the premises insured for the benefit of the mortgagee, to the amount of \$1,000. Subsequent to the assignment of the bond and mortgage to the plaintiff and the execution of the guaranty, the buildings on the premises were burned, and the sum of \$1,434 was collected on the insurance and received by the plaintiff, which reduced the mortgage to \$2,700. Default having been made in the payment of a subsequent installment on the mortgage, this

N. Y. Rep.] Opinion of the Court, per ANDREWS, Ch. J.

action for foreclosure was commenced and the defendant was joined as defendant therein by reason of his guaranty, and judgment was demanded against him for any deficiency, to the extent of his liability thereon. The only question is whether the mortgage has been reduced to \$3,000, within the meaning of the guaranty. It is of course conceded that there is now unpaid on the mortgage only the sum of \$2,700. But it has been reduced to this sum by the application thereon of the insurance money. Except for this there would be unpaid \$4,000 and upwards. Whether the sum received on the insurance is to be reckoned as a payment on the mortgage as between the plaintiff and the guarantor, and to be applied in exoneration of the guarantor's liability, depends on the true interpretation of the guaranty. The purpose of the parties to the arrangement is obvious. The plaintiff was willing to purchase the bond and mortgage and look to the property and the obligor's liability on the bond and the collateral security against fire, as his resource for the payment of the mortgage to the extent of three thousand dollars. But for the payment of the sum secured by the mortgage beyond that sum, he required, in addition to the other security, the personal guaranty of the defendant. The defendant undertook to this extent to become personally liable. The terms of the guaranty indicated that the parties had in view the reduction of the mortgage by payments made in the usual course. The guaranty was that the mortgage should be reduced by payments, "according to its terms." There are no terms of payment specified in the mortgage, except payments to be made by the mortgagor as provided. The payment made by the application of the insurance money was a payment out of the property itself. This insurance money was a substitute *pro tanto* for the property mortgaged. While the obtaining of an insurance was contemplated between the original parties to the mortgage, the payment on the insurance was not a payment on the mortgage "according to its terms." If the construction of the guaranty claimed by the defendant prevails, the plaintiff is deprived of the security intended thereby. It is

true that the mortgage has been reduced by the application of the insurance money, below \$3,000. But only by the conversion of part of the property into money and the application of the converted fund on the mortgage debt. The property remaining, as may be assumed from this litigation, is now inadequate to pay the balance remaining unpaid. If the mortgage in question had been a second mortgage, and on the foreclosure of the first mortgage a surplus had arisen, applicable on the subsequent security, but insufficient to satisfy it, could it be claimed that if less than \$3,000 remained unpaid by reason of such application the defendant was discharged? We think such a claim would be wholly unfounded. The case supposed is quite analogous to the present one. The plaintiff is entitled to no relief, not within the fair and reasonable construction of the guaranty. But we think the fair construction of the terms, in view of the purpose of the instrument and the situation of the parties when the warranty was executed, precludes the theory that the application of the insurance money was a payment which, as between these parties, reduced the mortgage below the stipulated amount. The defendant may, upon payment of the mortgage debt, be entitled to subrogation, or he may protect his interests so far as he can on the sale of the property, but he cannot, we think, upon any principle of law or equity, remit the plaintiff exclusively to the land, and the liability of the obligor in the bond for the payment of the balance of the mortgage.

The judgment of the Special Term is based upon a true interpretation of the guaranty, and the judgment there rendered correctly defines and limits the liability of the defendant.

The judgment of the General Term should be reversed, and that of the Special Term affirmed, with costs.

All concur.

Judgment accordingly.

DERASTUS SWARTHOUT et al., Respondents, v. WILLIAM F.
RANIER, Appellant.

S. died, leaving a widow and brothers and sisters surviving, but no descendants; by his will he gave all of his property to his wife, "to have and to hold for her comfort and support * * * if she need the same during her natural life." In a subsequent provision he gave to a church society \$1,000 after the death of his wife, if there should be enough of the property left at that time. The widow re-married and executed to her husband a mortgage on the real estate of which S. died seized. She thereafter died. In an action brought by the heirs at law of S. to have the mortgage declared fraudulent and void and to have it canceled of record as a cloud on plaintiff's title, *held*, that the widow took under the will a life estate with power also to take and convert to her own use so much of the *corpus* of the estate as she should need for her comfort and support; that instead of selling she had the right to mortgage for the purposes specified, and the presumption would be that the mortgage was executed for such a purpose; that, therefore, the mortgage was not void upon its face and could be enforced by the mortgagee without the disclosure of extrinsic facts rendering it invalid, and the burden of showing these was upon those assailing it; and so, that the jurisdiction of a court of equity was properly invoked to cancel the apparent cloud upon the title.

Reported below, 67 Hun, 241.

(Argued October 3, 1894; decided November 27, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 7, 1893, which reversed a judgment in favor of defendant entered upon a decision of the court dismissing the complaint on trial at Special Term and ordered a new trial.

This action was brought to have a mortgage executed by Ann E. Swarthout Ranier to the defendant, her husband, declared fraudulent and void and canceled of record as a cloud on the title to certain lands.

The facts, so far as material, are stated in the opinion.

James S. Havens for appellant. The complaint was properly dismissed as not stating a cause of action, and because on

therefore, that the General Term were right in reversing the judgment and sending the case back for a trial conducted upon correct principles, but without passing upon any possible defense which, under the pleadings, the defendants might have a remaining right to interpose.

The order should be affirmed, with costs, and judgment absolute be awarded against the defendants appealing upon their stipulation.

All concur.

Ordered accordingly.

HARRIET A. FRANCISCO, Respondent, v. CHARLES A. SMITH,
Appellant.

An agreement by the vendor, upon sale of a business and its good will, that he will not engage in a similar business in the same place for a period specified, is legal and valid and will be enforced by a court of equity.

Such an agreement is a valuable right in connection with the business it was designed to protect, and may be assigned by the purchaser upon a sale by him of the business, and the assignee may enforce it the same as the assignor could have done had he retained the business.

Defendant, who, in February, 1888, was carrying on the business of baker and confectioner in Little Falls, in that year sold the business, its good will and the property in his place of business to F., the husband of plaintiff, agreeing that he would not, for the period of five years from May first of that year, carry on that business in said village. F. carried on the business until November 10, 1889; he had given a chattel mortgage on a portion of the property, and on November 9, 1889, he gave a bill of sale to the mortgagees of all the property connected with the business; they, on the next day, by virtue of the mortgage and bill of sale, took possession of the property, closed the store and kept it closed until November nineteenth, when plaintiff, her husband acting as her agent, purchased the interests of said mortgagees, took possession, re-opened the store and thereafter carried on the business. Immediately prior to such purchase, plaintiff, with her husband, agreed that she would furnish the money to make the purchase and that he would take charge of and carry on the business in her name, the family to be supported out of it. On May 25, 1891, F., by an instrument in writing indorsed on the contract between him and defendant, in form transferred to plaintiff, without any actual consideration paid, all his interest in the contract and the covenants therein, the business formerly carried on by

him and the good will. In December, 1890, defendant, without consent of plaintiff or her husband, commenced carrying on a similar bakery and confectionery business in said village. *Held*, that an action was maintainable by plaintiff to restrain defendant from carrying on such business and for damages.

Reported below, 67 Hun, 225.

(Argued November 1, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 7, 1893, which reversed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term and ordered a new trial.

This action was brought to restrain defendant from carrying on a bakery and confectionery business in the village of Little Falls, and to recover damages for the violation of a contract not to engage in such business during five years from March 1, 1888.

Prior to the 20th day of February, 1888, the defendant carried on the business of baker and confectioner in Little Falls, and on that day he sold to Frank E. Francisco his business and the good will thereof, together with the property contained in his place of business, and agreed with him that he would not, for the period of five years from the 1st day of March then following, engage or become interested in the business of a baker or confectioner in that village. Mr. Francisco went into possession of the business on the 1st day of March, and carried it on at the same place until the 10th day of November, 1889. On the 27th day of February, 1889, he gave to Clark & Wood, of Fort Plain, a chattel mortgage on certain property connected with the business to secure money then loaned and a prior indebtedness; and on the 9th day of November, 1889, he gave them a bill of sale of the property mentioned in the mortgage and all the other property connected with his business; and on the next day they, by virtue of the mortgage and the bill of sale, took possession of the property and store and closed the store and took part of the property to Fort Plain, and remained in possession

death of my wife, Ann Elizabeth Swarthout, I will, devise and bequeath to the Wayne Village Baptist Church one thousand dollars, to be put out at interest, and the annual interest is to go toward the supporting a minister to preach for said church, if there is enough of my property left at the death of my wife." It is obvious from these provisions that the testator intended the gift to his wife to be something more than a life estate merely, and something less than the absolute fee: and that the widow took a life estate with power to take also and convert to her use so much of the *corpus* of the estate as she should need to apply to her comfort and support. He comprehended that she might need it all and so apply it to the permitted purpose as to leave none of it behind her at her death. The language he uses puts a double qualification upon his gift. The widow was "to have and to hold the same * * * during her natural lifetime," but "for her comfort and support if she needs the same." That more than a life estate was intended to be given is inferable from the language in which the gift to the church was made, but an absolute fee was obviously not contemplated although there is no remainder over. The quantity of interest vested in the wife was like that given to the husband in *Rose v. Hatch* (125 N. Y. 428), and was a life estate with power to take so much of the *corpus* as should be needed for her comfort and support.

What subsequently occurred was that the widow married a second time; that she gave to her husband a mortgage on the real estate devised for three thousand dollars; that she thereafter died; that her husband thereupon caused the mortgage to be recorded, and asserts its validity; and that the heirs at law, to whom the real estate descended, have brought this action to set aside and cancel the mortgage as a cloud upon their title, and that they have obtained judgment accordingly, from which the mortgagee brings this appeal.

His attack is solely upon the asserted equitable jurisdiction, assuming, as we hold, that his wife did not take the absolute fee. At Special Term the complaint was dismissed upon the

pleadings, and upon the ground that, taking as true all its allegations, there was no cloud upon the title, and no need or occasion for equitable relief. The reason for the decision was undoubtedly that, in the judgment of the court, the mortgage was void upon its face, and could only be supported, if at all, by proof of extrinsic facts, and that the party claiming under it could not enforce it without disclosing the defect which made it invalid. The General Term reversed the judgment, holding the contrary doctrine, arguing that the mortgage was not void on its face, and that it could be enforced by the mortgagee without need of a disclosure of the extrinsic facts rendering it invalid.

We are of opinion that the General Term decided correctly, and that in an action by the mortgagee to foreclose, or, after getting the title, in an action for the possession, the presumption would be, in the absence of proof of the extrinsic facts, that the conditions upon which the wife could lawfully have executed the mortgage existed, and that the burden of showing the contrary would rest upon those who assailed the transaction. The will gave the wife power to exhaust both the real and personal estate if needed for her comfort and support. In that event she was at liberty to sell the whole real estate and use the proceeds for her support. Instead of selling she could mortgage and appropriate the proceeds in the same manner. When she gave this mortgage she either honestly needed its proceeds and did what she had a right to do, or she committed a fraud, and perpetrated without authority an illegal act intended to injure the heirs at law. Fraud and illegality are not to be presumed without proof. Where execution of the mortgage might have been lawful and effective there is a presumption in its favor if the contrary requires us to presume fraud. The widow knew what she needed for her comfort and support. If she collected a note or sold a horse and spent the proceeds, and no further facts were shown, I think we should not presume that she exceeded her right, and so defrauded the next of kin. Where the truth of representations is a condition precedent to the liability of an insurer,

the insured is not bound to prove that truth in the first instance, but may stand upon the presumption of innocence. (*Cole v. Germania Ins. Co.*, 99 N. Y. 42.) Where a guardian executed a release under seal, which in certain contingencies he might lawfully have done, the burden of impeaching it was thrown upon the ward. (*Torry v. Black*, 58 N. Y. 190.) The law presumes that every man in his private and official character does his duty, and even acts done by a corporation which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. (*Bank of U. S. v. Dandridge*, 12 Wheaton, 70.) Following the analogy of these cases and many more like them, I think the mortgagee could stand upon his mortgage or a title derived therefrom without proof of the needs and the good faith of the wife, and that the burden of showing by extrinsic proof that the wife did not need the money, and that the mortgage was a sham or a fraud, would steadily rest upon the heirs at law who asserted it. For the husband put all the property in his wife's hands, and under her control, giving her a broad power and authority. He committed its preservation or exhaustion largely to her judgment, and while that judgment may not be conclusive we are bound to respect it and uphold it until evidence is given that it was exercised in bad faith and fraudulently as against the heirs at law. The burden is on them to prove the extrinsic facts. The mortgage is not void on its face: it can only become so by the operation of extrinsic proof.

The case, therefore, was one in which the jurisdiction of a court of equity to cancel the apparent cloud upon the title of the heirs at law could be properly invoked.

The order of the General Term should be affirmed, and judgment absolute rendered against the defendant upon his stipulation.

All concur.

Ordered accordingly.

ADDISON J. LYON, Respondent, v. VAN V. MORGAN et al.,
Appellants.

The rule that an estoppel binds the parties and their privies in estate and blood applies only as to a subsequent party when he simply represents the rights and interests of the party who created the estoppel. It does not apply to a party who, in the process of transferring real estate, has acquired a better title than his predecessor had.

S., who had a record title to an undivided one-fourth of certain real estate, was present when his co-owner executed a mortgage upon the whole parcel. The mortgagor asserted at the time that he was the sole owner, and that S. had no interest therein. S. assented to this and disclaimed all interest in the land. The mortgagee thereupon, without further inquiry as to title, took the mortgage. The interest of S. was thereafter sold on execution against him. Plaintiff purchased and received the sheriff's deed in good faith, relying upon the recorded title, and in ignorance of what took place when the mortgage was given. In an action for partition defendants claimed title to the whole of the land under a sale on foreclosure of the mortgage. It did not appear that there was any actual possession of the land when plaintiff purchased and took his conveyance which would operate as a constructive notice. *Held*, that plaintiff was protected by the Recording Act against an undisclosed equity in favor of the holder of the mortgage; that while S. was estopped from questioning the lien of the mortgage, the estoppel did not extend to and bind plaintiff, a *bona fide* purchaser; that he had a better title than S. which could not be defeated by an estoppel of which he had neither actual nor constructive notice.

Neither S. nor his judgment creditor or plaintiff were made parties to the foreclosure suit. *Held*, that, conceding plaintiff was bound by the estoppel, this extended only to the lien of the mortgage, and the legal title remained in him subject thereto; that S., or whoever represented his title at the time, was a necessary party to the foreclosure suit, and, as to his equity of redemption, the mortgage had not been foreclosed. Reported below, 64 Hun, 111.

(Submitted October 31, 1894; decided November 27, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made April 26, 1892, which reversed a judgment in favor of defendants entered upon a decision of the court dismissing the complaint made on trial at Special Term and directed a new trial.

This was an action for partition.

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The facts, so far as material, are stated in the opinion.

George Bowen and *Edward A. Washburn* for appellants. Silas N. Carman and his successors in interest are clearly estopped as against the mortgagee in the \$10,000 mortgage, and his successors, from claiming any interest in the lands mortgaged. (*T. B. Co. v. Duncan*, 86 N. Y. 221; *Storrs v. Barker*, 6 Johns. Ch. 166; *U. S. R. Co. v. Rothery*, 107 N. Y. 316; *Blair v. Wait*, 69 id. 113; *Grissler v. Powers*, 81 id. 61; 6 Wait's Act. & Def. 705.) Estoppels bind the parties and their privies in estate and blood. (*U. D. S. Inst. v. Wilmot*, 94 N. Y. 221; *Smith v. Cross*, 90 id. 549; 6 Wait's Act. & Def. 680, § 4; Code Civ. Pro. § 1632; *T. B. Co. v. Duncan*, 86 N. Y. 227.) To entitle himself to the benefit of the recording acts the plaintiff in this case must show, not only he was a *bona fide* purchaser for a valuable consideration, and without notice, but that his conveyance was first recorded. (*Westbrook v. Gleason*, 79 N. Y. 33; *C. N. Bank v. Dieffendorf*, 123 id. 201; *Seymour v. McKinstrey*, 106 id. 240; *Clute v. Emmerick*, 99 id. 350.) The opinion of the two justices who decided this case at General Term, that defendants or their predecessors in interest, had been guilty of such *laches* as precluded them from the advantage of the alleged estoppel, is not well founded. (*Moore v. Nye*, 49 N. Y. S. R. 168.)

Edward K. Clark for respondent. The legal title to the undivided one-fourth of the sixteen acres in question was in Addison J. Lyon, the original plaintiff, and is now in the respondent. (*Barker v. Bell*, 37 Ala. 359; *Sheldon v. Wright*, 5 N. Y. 514; *Ackley v. Dygert*, 33 Barb. 190.) The doctrine of estoppel is not applicable to the case at bar. (*Comm. v. Moltz*, 10 Penn. St. 532; *Andrews v. E. L. Ins. Co.*, 85 N. Y. 344; *Mueller v. Knaessman*, 84 Mo. 318; *Ackley v. Dygert*, 33 Barb. 193; *Ketchum v. Duncan*, 96 U. S. 667; *M. Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 638.) In any event, if the law of estoppel still has an existence, when applied to the title to real estate, it should not be

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Opinion of the Court, per O'BRIEN, J.

extended, but every reasonable effort made to curtail it, and it should be cautiously applied. (*T. B. Co. v. Duncan*, 86 N. Y. 230; *Thompson v. Simpson*, 128 id. 270; *Gove v. White*, 20 Wis. 430.) The trial court based its decision mainly on the erroneous view that Lyon did not prove that he acted in good faith and without knowledge. (*Wood v. Chapin*, 13 N. Y. 509; *L. F. Co. v. L. G. & F. Co.*, 82 id. 477; *Jackson v. Alexander*, 3 Johns. 484; *Ward v. Isbill*, 73 Hun, 552; *Jackson v. Chamberlain*, 8 Wend. 620, 627; *Barto v. T. C. N. Bank*, 15 Hun, 13; *Maroney v. Boyle*, 141 N. Y. 469, 470; *Jackson ex dem. v. Post*, 15 Wend. 588; *Hetzel v. Barber*, 69 N. Y. 10; *Holland v. Brown*, 140 id. 347, 348; *Wood v. Morehouse*, 1 Lans. 412; 45 N. Y. 368; 2 Pom. Eq. Juris. § 724.) To invalidate Lyon's title by an estoppel *in pais*, such as is sought in this case, would give to naked words a force and effect which is denied to the most formal instruments executed under hand and seal. (*Jackson v. Post*, 15 Wend. 593.) In order to enable a person to claim the benefit of an estoppel *in pais* in regard to title, it is essential that two negatives must concur. He must have been destitute of the means of acquiring a knowledge of the title, and he must not have been guilty of *laches*. (Herman on Est. [ed. 1886] §§ 966, 969, 974; *Comm. v. Moltz*, 10 Penn. St. 531.) Oral declarations are not admissible as evidence of a record title. (*Jackson ex dem. v. McVey*, 15 Johns. 237; *Gibney v. Marchay*, 34 N. Y. 301.) Declarations of a prior owner will not be received to impair the record title of real estate. (*Gibney v. Marchay*, 34 N. Y. 303.) The defendants have the affirmative to prove, on question of notice. (2 Herman on Est. [ed. 1886] § 793; *Holland v. Brown*, 140 N. Y. 347; 1 Devlin on Deeds, §§ 639, 640, 642.) Plaintiffs' equities are superior to those of the defendants. (2 Herman on Est. § 974; *Comm. v. Moltz*, 10 Penn. St. 532; *Carpenter v. Stilwell*, 11 N. Y. 74; *Weaver v. Borden*, 49 id. 299.)

O'BRIEN, J. The plaintiff claimed to be the owner and in possession of the undivided one-fourth part of sixteen acres of

land which he sought to partition in this action, the defendant William A. Morgan being the owner of the other three-fourths. The complaint was dismissed at the trial on the ground that the plaintiff had failed to show any title to the land or any right to maintain the action. This judgment has been reversed by the General Term and a new trial granted. The original defendant, William A. Morgan, died after the entry of the judgment, and his infant children, who have succeeded to his title, are the present defendants upon the record. The plaintiff and Morgan claimed title to the land or the interest sought to be partitioned from different sources. The plaintiff's title rests upon a sheriff's deed given upon a sale under an execution issued upon a judgment recovered by the First National Bank of Binghamton against Silas N. Carman June 16, 1888. The land was not redeemed from the sale and the deed was delivered to the plaintiff January 25, 1890, and recorded January 28, 1890. The record title was then apparently in the judgment debtor under a deed to him from the former owner, delivered and recorded in 1872. The plaintiff was the highest bidder at the sale and paid \$762.95, which satisfied the judgment.

On November 26th, 1883, Joseph Carman, the father of Silas N. Carman, borrowed of Albert E. Smith, as guardian of an infant, the sum of \$10,000, and to secure the payment thereof gave to him a mortgage on a considerable tract of land, which included the land in question. At the time of making this loan the mortgagee was assured by the mortgagor that he was the owner of the piece of land in controversy, and that his son Silas had no interest in it, and Silas himself, in the presence of the mortgagee and his father, assented to this statement and disclaimed all interest in the property, and the mortgagee, without further inquiry as to the title, made the loan and took the mortgage on the faith of these statements. On December 1, 1888, an action was commenced to foreclose this mortgage by the defendant Waterman, who succeeded Smith as guardian. The action was prosecuted to judgment, and the premises described in the mortgage, which included

the land in question, were sold by the referee to William A. Morgan February 11, 1890, and the conveyance duly recorded February 20, 1890. Morgan's bid was \$6,800 and \$5,000 of it was secured by a mortgage for that amount by the purchaser to the guardian. Neither Silas N. Carman nor his judgment creditor, the bank, or the plaintiff, were made parties to the foreclosure. It is contended in behalf of the defendants, who claim under the referee's deed upon the foreclosure sale, that Silas N. Carman is estopped by his statements and admissions from denying their title under the mortgage, and that this estoppel extends to the plaintiff. The doctrine of estoppel, when invoked for the purpose of working a change in the title to land, is to be applied with great caution. It permits verbal statements or admissions to be substituted in place of the written evidence of transfer which the Statute of Frauds and the general rules of law require in such cases, and hence should not be applied unless the grounds upon which it rests are clearly and satisfactorily established, and not then except in support of a clear equity or to prevent fraud. (*Thompson v. Simpson*, 128 N. Y. 270; *Trenton Banking Co. v. Duncan*, 86 id. 230.)

The plaintiff, so far as the record shows, was a purchaser in good faith and for a valuable consideration, relying upon a recorded title, not affected by anything, so far as appears, unless it be the admissions which the owner made when his father assumed to mortgage it, and of these admissions he had no notice. It does not appear that there was any actual possession of the land when he purchased and took his conveyance that would operate as constructive notice, and, therefore, he was protected by the Recording Act against an undisclosed equity in favor of the holder of the mortgage. (*Holland v. Brown*, 140 N. Y. 344.)

It is quite true that Silas N. Carman, the owner, was estopped from questioning the lien of the mortgage upon this land as between him and any one claiming under it, upon the findings of the court in this case. But that estoppel did not extend to and bind a *bona fide* purchaser. The rule that estoppels bind the parties and their privies in estate and blood applies only when subsequent parties represent the rights and

estate of the party who created the estoppel, and nothing more. It does not apply to a party who, in the process of transferring real estate, has acquired a better title than his predecessor had. While Silas N. Carman might not be permitted to question the defendants' title under the mortgage, yet the plaintiff may, for the reason that he purchased in good faith for a valuable consideration, relying upon the record title in the judgment debtor and in ignorance of the transaction that took place when the mortgage was given. He has, therefore, a better title than the judgment debtor had, which cannot be defeated by an estoppel of which he had neither actual nor constructive notice.

But even if the plaintiff could be bound by the estoppel, it extended only to the lien of the mortgage and could not be given any greater effect than if Carman had joined in that instrument. As the legal title would then have remained in him subject to the mortgage, so it did when he made it a lien by estoppel, and hence he, or whoever represented his title, still owned the equity of redemption, and, therefore, were necessary parties to the action to foreclose the mortgage. The most favorable view that can be taken of the case for the defendants would put Carman in the position of a party who had consented to charge his land with the lien of a mortgage. He did not by such consent extinguish his equity of redemption any more than he would had he become a party to the mortgage, and, therefore, it must follow that as to the interest which remained in him the mortgage has never been foreclosed. But unless the defendants are able to charge the plaintiff with some notice, actual or constructive, of the transaction which took place between Silas, his father and the mortgagee at the time that he purchased and paid for the land at the execution sale, then the plaintiff's title is superior and must prevail.

The order reversing the judgment of the trial court and granting a new trial should be affirmed and judgment absolute ordered for the plaintiff, with costs.

All concur.

Ordered accordingly.

FRANK M. HUNTING, Respondent, v. FERDINAND S. M. BLUN,
Appellant.

In an action under the General Manufacturing Act (§ 18, chap. 40, Laws of 1848) to enforce the liability imposed by the act upon a stockholder of an insolvent corporation, to excuse the non-performance of the condition precedent to such liability, *i. e.*, the recovery of a judgment against the corporation and the return of an execution issued thereon unsatisfied, plaintiff produced a record of a judgment in an action in the Supreme Court, brought by a judgment creditor of the corporation to sequester its property and for the appointment of a receiver. The complaint in that action alleged the recovery of a judgment against the corporation in the Auburn City Court, and the issue and return of an execution thereon unsatisfied. The judgment granted the relief sought, and forbade creditors from suing the company. The corporation was not located in said city. Defendant claimed that the judgment was void for want of jurisdiction, and so the injunction was a nullity and might have been disregarded. *Held*, that, conceding the invalidity of the judgment, plaintiff was not bound to disregard it, and that the non-performance of the condition was excused; but, *held*, that the complaint in the former action presented a case over which the court had jurisdiction; that the question as to the validity of the City Court judgment was one of law for it to decide, and, although it erred in adjudging it to be valid, this was a judicial error, and the judgment of sequestration could not be attacked collaterally, but the mistake, if made, was available only on appeal or some direct review of the decision.

Reported below, 69 Hun, 562.

(Argued October 22, 1894; decided November 27, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 23, 1893, which denied a motion by defendant for a new trial and directed judgment in favor of plaintiff upon the verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

B. T. Wright for appellant. The court erred in denying defendant's motion for a non-suit. (Laws of 1848, chap. 40, § 24; *Dean v. Mace*, 19 Hun, 391; *Farnsworth v. Wood*, 91 N. Y. 308; *Crippin v. Hudson*, 13 id. 161; *R. M. N. Bank*,

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v. *Bliss*, 89 id. 338; Code Civ. Pro. § 1784; *Slee v. Bloom*, 5 Johns. Ch. 366; *Decker v. Gardner*, 124 N. Y. 334; *Gilman v. G. P. S. Co.*, 61 Barb. 1; *Galway v. U. S. S. S. R. Co.*, 36 id. 256; *Ervin v. O. R. R. N. Co.*, 62 How. Pr. 490, 491; *People v. A. & S. R. R. Co.*, 55 Barb. 344; *Waterbury v. M. U. E. Co.*, 50 Barb. 157.) The Rheubottom & Teall Manufacturing Company was not a resident of the city of Auburn when the City Court action was commenced. Nor does the fact that its president was within the city of Auburn when the summons was served upon him, aid the plaintiff any. (*Hubbard v. N. P. Ins. Co.*, 11 How. Pr. 149, 151; *Conroe v. N. P. Ins. Co.*, 10 id. 403, 404; *O. S. Factory v. Dalloway*, 21 N. Y. 449, 455; *W. T. Co. v. Scheu*, 19 id. 408; *U. S. Co. v. City of Buffalo*, 82 id. 351, 355, 356; *Phillips v. B. L. Co.*, 21 Atl. Rep. 640; *Carpenter v. W. A. B. Co.*, 32 Fed. Rep. 434, 435; *Reifsnider v. A. I. P. Co.*, 45 id. 433; *Eliot v. Piersol*, 1 Pet. 328; *Turner v. Roby*, 3 N. Y. 193.) If plaintiff is permitted to introduce a judgment in evidence, as an excuse for not performing a duty required by statute, it is just to allow defendant to invalidate the excuse by showing the judgment to be void, and a general denial is sufficient to permit this. (*O'Brien v. McCann*, 58 N. Y. 373; *Milbank v. Jones*, 141 id. 340; *Greenfield v. M. M. L. Ins. Co.*, 47 id. 430; *Wheeler v. Billings*, 38 id. 263-265.) A mere inspection of the judgment entered in the City Court of the city of Auburn, in the case of *N. Bank v. R. & T. M. Co.*, which is the alleged basis of the sequestration action, shows that that court had no jurisdiction of the Rheubottom & Teall Manufacturing Company, for it shows on its face that that company was a duly organized corporation located and doing business at the village of Weedsport, N. Y. (*Gilbert v. York*, 111 N. Y. 544; *Fries v. Ford*, 6 id. 176.) The judgment of sequestration and the orders therein contained restraining creditors are void, and do not constitute an excuse for the plaintiff in this action for not performing the statutory condition precedent of obtaining a judgment against the corporation before bringing his action against a stock-

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holder. (*Yates v. Lansing*, 9 Johns. 407; *Turner v. Roby*, 3 N.Y. 193, 194, 195; *Cleveland v. Rogers*, 6 Wend. 438, 439; *People v. Koeber*, 7 Hill, 39-41; *Sackett v. Andross*, 5 id. 327-330; *Dakin v. Hudson*, 6 Cow. 221; *Cornell v. Barnes*, 7 Hill, 35; *Barnes v. Harris*, 3 Barb. 603; *Bridge v. Ford*, 4 Mass. 641; *Wiley v. Stickland*, 8 Ind. 453; 2 Black on Judg. § 966; *McCracken v. Flanagan*, 127 N. Y. 493; *Footo v. Stevens*, 17 Wend. 483; *Colwell v. G. N. Bank*, 119 N. Y. 408.) Where the existence of a condition or status of the defendant is necessary to confer jurisdiction, as in this case, the recital of fact in the record showing such condition or status is only *prima facie* evidence of those facts, and they may be contradicted when the record is offered in evidence or relied upon for any purpose. (*People ex rel. v. Warden*, 100 N. Y. 20; *Dobson v. Pearce*, 12 id. 156; *Harrington v. People*, 6 Barb. 607; *Craig v. Town of Andes*, 93 N. Y. 405; *Adams v. S. & W. R. R. Co.*, 10 id. 328; *Kerr v. Kerr*, 41 id. 272.) It was error to receive in evidence an order made on the 7th day of April, 1891, upon the petition of the receiver, in which it was alleged he asked permission to pay the employees' accounts as preferred claims, and that the application was denied. (Laws of 1885, chap. 376.) Plaintiff should not succeed in this action for the reason that he has not exhausted his remedy against the corporation. (*Brown v. A. B. C. F. Co.*, 52 Hun, 151; Code Civ. Pro. § 1784; *A. B. Co. v. Sylvester*, 68 Hun, 401; Laws of 1885, chap. 376.)

E. C. Aiken for respondent. A cause of action against a corporation or a stockholder in favor of a laborer is assignable. (*Wakefield v. Fargo*, 90 N. Y. 123; *Kincaid v. Dwinnelle*, 59 id. 548; *Pilcher v. Brayton*, 17 Hun, 429; Code, §§ 1909, 1910; *Bolen v. Crosby*, 49 N. Y. 183; *Allen v. Clark*, 21 N. Y. Supp. 338.) Where a condition precedent to the maintenance of an action has become impossible, such condition precedent is no longer in force. (*Kincaid v. Dwinnelle*, 59 N. Y. 548; *Shellington v. Howland*, 53 id. 371; *Hardman v. Sage*, 124 id. 32.) The court properly excluded evidence

tending to impeach the sequestration judgment. (*Roderigas v. E. R. S. Inst.*, 63 N. Y. 460; Code Civ. Pro. § 405.)

FINCH, J. The plaintiff as assignee of certain employees of an insolvent corporation sued the defendant, a stockholder, for the amount of their unpaid wages. It was necessary for the plaintiff to prove the condition precedent attached by the law to his right of action that judgment upon the demand had been rendered against the corporation, and execution thereon had been returned unsatisfied. He proved such a judgment, obtained in the Auburn City Court, but the corporation was located out of the city, and the judgment was held to be a nullity for want of jurisdiction in the local court. The plaintiff then sought to excuse the non-performance of the essential condition by showing that it became impossible within the period prescribed. He produced the record of an action in the Supreme Court brought by a creditor of the corporation to sequester its property and for the appointment of a receiver. Judgment was rendered granting that relief and forbidding creditors from suing the company or interfering with its assets. This injunction made performance of the condition precedent practically impossible. Such fact excused the omission. (*Hardman v. Sage*, 124 N. Y. 32.) But the defendant now attacks that judgment as also void for want of jurisdiction, and insists that plaintiff was at liberty to sue, and could have disregarded the injunction as a nullity and without being guilty of contempt of court. Even if that were true, I do not think he was bound to take the risk. In judging of his omission to act, and measuring the quality of his excuse, it does not seem to me that we should require him to go behind the explicit order of the court and determine at his peril whether he could safely defy it. The fact of its existence may reasonably justify a conclusion that a practical impossibility stood in the way of a suit by plaintiff against the corporation. But, however that may be, I think the judgment of sequestration and the injunction which accompanied it were not shown to be void by any evidence which the

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defendant offered. The plaintiff in that case by his complaint fairly alleged all that was needed to authorize the judgment of the court. It avers the recovery of a judgment against the corporation in the Auburn City Court, the docket of that judgment in the Cayuga county clerk's office, the issue of an execution and the return of the same unsatisfied. Those allegations presented a case over which the jurisdiction of the court was unquestionable. They were sufficient to invoke and require a judicial determination whether they were true or not and whether sequestration should follow. It may be that the court erred in regarding the City Court judgment as valid. That was a question of law for the court to decide, and its error, if it made one, was a judicial error to be corrected by an appeal. We held substantially that in *Whittlesey v. Frantz* (74 N. Y. 457). That was a case like the one before us in every respect except as to the defect which made the creditor's judgment void and null.

The difficulty there was that by reason of a misnomer the corporation had not been sued at all, and there was no judgment against it. Our first answer to the objection went upon the concession that the error might make the judgment invalid, but we held that the judgment of sequestration could not be collaterally attacked for error in the proofs on which it rested. So in this case the evidence may have been insufficient and the court in error, either because no defect was alleged or pointed out, or because the court thought that the presence of the president of the corporation in Auburn, where a part of the corporate property was situated, answered the requirement of the statute as to the defendants that "they are within the city of Auburn." (Laws of 1887, chap. 633, § 2.) However erroneous the decision might have been, the court had jurisdiction of the subject-matter presented for its consideration, and its mistake, if made, was only available on an appeal or some direct review of the decision. We think the case cited is decisive of this appeal.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

ESTHER C. TOWNSEND et al., Appellants, v. JOSHUA RACKHAM
et al., Respondents.

The record of a deed, while it may with other facts afford a presumption of delivery by the grantor to the grantee, is not conclusive evidence of such delivery.

Where a promise is made by one person to another for the benefit of a third, in the absence of any liability of the promisee to such third person the latter cannot enforce the promise.

Lawrence v. Fox (20 N. Y. 268); *Gifford v. Corrigan* (117 id. 257), distinguished.

F., in 1857, conveyed certain premises to two of her grandchildren, taking back a mortgage which was conditioned for the payment by the mortgagors to her of specified sums annually and that they should provide for her board, clothing and all things proper for her comfort and support during her life, and five years after her death that they should pay \$1,000 to M., a sister, and \$500 to E., a granddaughter of the mortgagee. This mortgage was soon after satisfied of record, and said mortgages executed and delivered to F. another mortgage on the same premises, with substantially the same conditions save a slight alteration as to her clothing and support. Thereafter, up to the time of the death of F., there was a series of conveyances to and from F. and the grantees in the first deed or their wives, and of mortgages executed by them, containing substantially the same conditions except that in the later mortgages the condition as to the payments to M. and E. were omitted. These mortgages, save the last one, were each satisfied by the mortgagee in their order. In an action to foreclose the mortgages containing the condition so omitted, wherein plaintiffs claimed as representatives of the interests of M. and E., the referee found that each subsequent mortgage was intended as a substitute for the preceding one and that F. received them upon the understanding and belief that the arrangement was testamentary in its character and that she retained possession and control of each mortgage until it was satisfied; also that neither M. nor E. had any knowledge or took any delivery of, or in any manner accepted or assented to any of the mortgages. *Held*, that no trusts in favor of M. and E. were created by the mortgages, but that the finding that the provisions for the payments to M. and E. were in their nature testamentary was proper, and so they were subject to alteration at any time by the assent of the parties to the mortgages.

McPherson v. Rollins (107 N. Y. 316) and *Martin v. Funk* (75 id. 134), distinguished.

Reported below, 68 Hun, 231.

(Argued October 26, 1894; decided November 27, 1894.)

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APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 28, 1893, which affirmed a judgment in favor of defendants entered upon a decision of the court dismissing the complaint on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry W. Davis for appellant. The allegations of the complaint embody the admission that Esther C. Lutts and Maria Leach did know of the execution and delivery of the several mortgages. The several discharges were found by the trial judge executed and delivered without the concurrence of either Esther C. Townsend or Maria Leach. No evidence is competent or if admitted effectual to contradict these admissions. (*Fleischman v. Stern*, 90 N. Y. 110; *Emery v. Baltz*, 94 id. 408; *Beard v. Tilghman*, 20 N. Y. Supp. 736.) Each of the seven mortgages was in fact and in the contemplation of all the parties to each transaction three separate mortgages, one to Catharine Farnham, one to Esther C. Lutts and one to Maria Leach, the rights of each being fully determined and stated in each mortgage, and each party could only discharge so much as was for her benefit. (*Ludlow v. McRae*, 1 Wend. 231; *Smith v. Post*, 1 Hun, 516, 519; *Griswold v. Perry*, 7 Lans. 98; *Swartout v. Curtis*, 5 N. Y. 301; *Giddings v. Stewart*, 16 id. 265, 368; *Smith v. Bowen*, 35 id. 83, 90; *Waterman v. Webster*, 108 id. 157.) In the absence of any bond accompanying the mortgage the presumption is that the amount named in each mortgage was a then present debt owing by the mortgagors to each of the mortgagees separately. (*Spencer v. Spencer*, 95 N. Y. 353, 356, 357; *Besley v. Taylor*, 5 Hill, 577, 583; *Jackson v. Perkins*, 2 Wend. 317; *Church v. Gilman*, 15 id. 656; *Lawrence v. Farley*, 24 Hun, 293; *Knolls v. Barnhardt*, 71 N. Y. 474.) The deed and mortgage of September 26, 1857, was one transaction. (*Dusenbury v. Hulbert*, 59 N. Y. 541.) A promise made by one person for the benefit of another can

be enforced by the other person. (*Todd v. Weber*, 95 N. Y. 181, 192-195; *Rector v. Teed*, 120 id. 583; *S. G. & B. v. Sutzer*, 138 id. 468.) Each of the defendants whose conveyance or incumbrance is subsequently recorded, and that includes each defendant in this action, had constructive notice of each of these seven mortgages set out in the complaint. (*Viele v. Judson*, 82 N. Y. 32; *Waterman v. Webster*, 108 id. 157.) Even if the several transactions did not each create a trust, the mortgage being an executed conditional transfer of the land delivered, accepted and recorded, the land became and still is pledged to the plaintiffs for the several sums of money for which the action is brought, free by the Recording Act from any claims of any defendant and as effectual in every particular as though each mortgage had been made payable to Mrs. Farnham and by her transferred to plaintiffs. (*Bucklin v. Bucklin*, 1 Keyes, 141; *Thayer v. Marsh*, 75 N. Y. 340; *Sanford v. Ellithorp*, 95 id. 48.) No one of the defendants can contest the validity of each or any of plaintiffs' mortgages. (*McConihe v. Fales*, 107 N. Y. 404.) Objection to the competency of witness need be made but once. (*Church v. Howard*, 79 N. Y. 415.) The testimony of Lovina L. Wilson, equally with that of the defendant Almeron C. Wilson, is immaterial and incompetent as to a personal transaction with Catharine Farnham on the subject of a conveyance of the land to the husband. (*Steele v. Ward*, 30 Hun, 555; *In re Clark*, 40 id. 233.) The trial court erred in refusing to strike out the testimony of witness Julius Kuck as to statements of Mrs. Farnham made long after transaction took place. (*Sanford v. Ellithorp*, 95 N. Y. 48.)

George Bullard for respondent. Parol evidence was competent to prove the character of the mortgage, and, it being shown to be testamentary in character, Mrs. Farnham had the right to discharge it. (*Kelsey v. Cooley*, 11 N. Y. Supp. 745; *Markey v. Markey*, 13 id. 925; *Meigs v. Meigs*, 15 Hun, 453; *Stokes v. Pease*, 19 Wkly. Dig. 310; *Garnsey v. Monday*, 44 N. J. Eq. 243; *Gates v. Hames*, 28 N. Y. S. R. 313;

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Weber v. Weber, 58 How. Pr. 256.) Lovina Wilson was not excluded as a witness by section 829 of the Code. (*Simmons v. Havens*, 101 N. Y. 428; *Whitehead v. Smith*, 81 id. 157; *Allis v. Stafford*, 14 Hun, 318.)

PECKHAM, J. The plaintiffs brought this action to foreclose seven mortgages executed by some of the defendants at different times upon the same premises. The defense of payment was set up and has thus far prevailed. By the will of one Mathias Brown, which was duly proved September 22, 1857, Catharine Farnham became the owner of a farm of 150 acres of land. She was then 73 years of age. On the 26th of the same month she conveyed the same farm to Almeron C. Wilson and Valentine A. Wilson, two of her grandchildren, and took back from them a mortgage on the same premises. The condition stated in this mortgage was as follows: "This grant is intended as a security for the payment of the following sums of money, to wit: \$75.00 on the first day of January and \$75.00 on the first day of July in each and every year thereafter during the natural life of the party of the second part, to be paid to the party of the second part at the homes of the said parties of the first part, in the town of Carlton.

"And the further sum of \$1,500 to be paid as follows: \$1,000 to Maria Leach or her heirs five years from the death of the said party of the second part, and \$500 to be paid to Esther C. Lutts five years from the death of the said party of the second part (the several sums herein mentioned are for the purchase money of said premises). And as further consideration to these presents it is agreed between the parties that in addition to the sums above mentioned and agreed to be paid the said parties of the first part agree to and with the party of the second part to provide her, the said Catharine Farnham, at their home or homes, at all times when she may choose during her natural life, and provide for her board and all necessary clothing, and all things necessary and proper for her comfort and support during her natural life.

"And this conveyance shall be void if such payments be

made as herein specified and in case default shall be made in the payment of the above sums hereby intended to be secured or any part thereof, or in case default be made in providing for and taking care of the party of the second part as above provided, it shall be lawful for the party of the second part, her executors, administrators or assigns, at any time thereafter, to sell the premises hereby granted, or any part thereof, in manner provided by law, and out of the moneys arising from such sale to retain the amount then due, together with costs and charges of making such sale. Or in case default during the lifetime of the said Catharine Farnham shall be made in any of the above conditions the party of the second part may re-enter and take possession of the above-described premises and declare this obligation void."

The Maria Leach named in the above mortgage was the sister, while Esther C. Lutts was one of the grandchildren of the mortgagee, Catharine Farnham.

On the 12th of Oct., 1857, this mortgage was satisfied by the mortgagee, and a satisfaction piece was duly recorded. On the 13th of October, 1857, the same mortgagors executed and delivered to the same mortgagee another mortgage on the same premises, with the condition therein substantially the same as in the first mortgage, with the exception of some slight alteration as to the terms upon which the clothing and support of the mortgagee were to be given, which was stated to be while she was living with the mortgagors. Thereafter, between Oct. 15, 1858, and the time of her death, there was a series of conveyances of this farm to and from Catharine Farnham and the grantees in the first-named deed, or to their wives in one form or another, and there was also a series of mortgages executed by the grantees in the deeds, each of which mortgages contained substantially the same condition as the first-mentioned one, varying sometimes in the amounts and times of payment, excepting that the last mortgages left out the condition as to the payment of any money whatever to either Maria Leach or Esther C. Lutts. The referee found that the mortgages, up to the last one in which the sister and

grandchild were left out, and in which they had no interest, had all been satisfied in their order, and the satisfaction pieces duly recorded, and that each subsequent mortgage was intended as a substitution for the preceding one which was satisfied by Catharine Farnham. He also found that she took the various mortgages upon the understanding and belief that the whole arrangement was testamentary in its character and in the nature of a will; that she retained possession and control of the various mortgages until new arrangements were made upon good consideration passing to her, and then she duly satisfied such mortgages and received others in their place. He further found that neither Maria Leach nor Esther Lutts had any knowledge or took any delivery of or in any manner accepted or assented to any of the mortgages mentioned in the complaint, or any of the provisions in any of the mortgages providing in any way in their favor prior to the satisfaction of such mortgages.

These are the mortgages to foreclose which this action is brought, and the plaintiffs claim, as representing the interests of Maria Leach and Esther C. Lutts, that the amounts named in each of the mortgages in their favor are now due the plaintiffs, and that as to them there has been no satisfaction of any one of such mortgages. Although there is no question that Catharine Farnham signed the satisfaction pieces of the various mortgages and intended thereby to satisfy them, yet the contention is that, after she had taken the first mortgage with the condition as to the payment of the moneys to Maria Leach and Esther Lutts, she never had the power to thereafter satisfy that mortgage or any subsequent one so far as the payments to them were concerned, and the plaintiffs insist that each mortgage subsequent to the first, instead of being a substitution for its predecessor, became security for the payment of the sum mentioned in the mortgage in addition to the amounts mentioned in the earlier instruments. If this be the true state of the case, the payments provided for Maria Leach and Esther C. Lutts have grown from the amounts mentioned in the first mortgage, \$1,000 and \$500 respectively, to the total

sum of \$6,750, together with interest from August 20, 1883, that date being five years after the death of Catharine Farnham. It seems to us to be a very plain case against the plaintiffs.

They urge that the condition in these mortgages amounts to a promise made by one person to another for the benefit of a third, and that such third person can enforce the liability thus created.

There are, as it seems, many answers to that position.

Catharine Farnham, at the time of the first deed from her to the grantees therein named, was the owner in fee of the farm therein conveyed. The mortgage given back to her was security for the purchase money of the farm. There is no evidence that she ever owed a penny or was under any pecuniary obligation to her sister or granddaughter named in the mortgage which she took back. As there was not a particle of proof of such a fact, the promise (assuming one was made) of her debtors made to her to pay money to a third person to whom she owed no debt, and was under no legal liability, was not such a promise as could be taken advantage of by that third person. Again, the form of the conditions in these various mortgages, and the actual dealings between the parties to them, as evidenced by the records of the several deeds and mortgages, afford an overwhelming presumption that the provisions for the payments to these ladies after the death of the mortgagee, Catharine Farnham, were in their nature testamentary, amounting to nothing more than a legacy or gratuity given by or coming from the mortgagee, and the whole conditions of the various mortgages were obviously subject to alteration at any time by the assent of the parties thereto.

The doctrine of *Lawrence v. Fox* (20 N. Y. 268) and the subsequent cases can furnish no ground for sustaining the right of the plaintiffs to maintain this action. In none of them is there an intimation that the action could be sustained by the third person in the absence of any liability in his favor due or to grow due from the one to whom the promise was made. In *Gifford v. Corrigan* (117 N. Y. 257) Judge FINCH reviews the subject and cites the various authorities, and states the grounds upon which the liability has been

placed. To maintain the action by the third person there must be this liability to him on the part of the promisee. Plaintiffs claim that the existence of these mortgages, their record in the clerk's office, and the beneficial nature of the provisions therein for those third parties, form proof enough of a delivery of the mortgages to them and of their acceptance of the provisions in their favor, and that hence those provisions could not be altered without their consent.

Finding upon the records a deed from one party to another is not always evidence of a delivery by the grantor to the grantee. Taken with other facts it might afford a presumption, but it is never conclusive evidence as claimed by counsel for plaintiffs. (*Gifford v. Corrigan*, 105 N. Y. 223-227.) But we have a finding founded upon evidence that the mortgages were delivered to Catharine Farnham and that she alone had possession of and controlled them, gave them up, satisfied them and took others in their stead. There is no admission in the answer to the contrary. The plaintiffs alleged that the discharges of these mortgages were made without the knowledge or concurrence of Maria Leach or Esther Lutts. This allegation in the complaint was denied in the answer, and upon information and belief it was alleged that each knew of the making and execution of these satisfaction pieces. This is no admission, and the finding is that they did not know of or consent thereto, the further finding being that they knew nothing of the existence of the mortgages themselves. Nor do these various mortgages constitute a trust for Maria Leach and Esther Lutts. A perusal of each or all of them induces a clear belief on our part that there was not the slightest intention or desire to create a trust on the part of any of the parties to these mortgages. In that respect and in others they are different from the case of *McPherson v. Rollins* (107 N. Y. 316), cited by counsel. In that case the purpose was to make a provision for the present maintenance of the mortgagee's daughter and two grandchildren, and it was, therefore, provided that certain payments should be made by the mortgagor at once and should be continued to be made by her

periodically during a certain time. We held it was apparent that a trust in favor of the grandchildren was intended, which could not be satisfied by the mortgagee therein. The case of *Martin v. Funk* (75 N. Y. 134) was cited to sustain that decision.

Here, however, we have a case where in the writings themselves there are no appropriate words creating a trust, and the surrounding circumstances are clearly such as to prevent any implication of an intention to create one. By the surrounding circumstances I mean the repeated changes made by the parties in these various deeds and mortgages, which, coupled with the language used in all of the mortgages, conclusively point to these provisions in favor of these ladies as being simply testamentary in their character. Upon this view it was immaterial whether it was error to admit evidence as to the oral statements of the attorney and Catharine Farnham when he was called to make a will for her. The various instruments themselves lead to the same conclusion, and hence no harm has been done if there were this error, which, however, we do not intimate or decide.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

THE MISSION OF THE IMMACULATE VIRGIN FOR THE PROTECTION OF HOMELESS AND DESTITUTE CHILDREN IN THE CITY OF NEW YORK, Respondent, v. MICHAEL CRONIN, Appellant.

Where land is uninclosed, uncultivated, unimproved and unoccupied, the facts that a person has for twenty years claimed title thereto, surveyed it, marked its boundaries by monuments, cut trees thereon from time to time, and for a few years has paid taxes thereon, do not establish an adverse possession, nor do these facts, in the absence of a constructive or actual possession, authorize the presumption of a grant from the true owner.

Boe v. Strong (119 N. Y. 316); *McRoberts v. Bergman* (182 id. 78), distinguished.

(Argued October 30, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 17, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Abner C. Thomas for appellant. The admission that the partition of 1809 is the common source of title is fatal to the plaintiff's case. (Code Civ. Pro. §§ 368-372.) The acts of trespass committed by the grantors of the defendants in cutting cedars on the property did not constitute possession. (*Thompson v. Burhans*, 61 N. Y. 52; 79 id. 93, 99, 100; *Miller v. Downing*, 54 id. 631; *Munro v. Merchant*, 28 id. 9; *Argotsinger v. Vines*, 82 id. 313; *Wheeler v. Spinola*, 54 id. 377, 387; *Price v. Brown*, 101 id. 669.)

James F. Swanton for respondent. To sustain the appeal of the defendant it must be shown as a matter of law that the evidence was not sufficient to sustain the plaintiff's claim of title. (*Thompson v. Simpson*, 128 N. Y. 270.) The property was wild land. It was admitted that it formerly belonged to Bannister. The plaintiff's grantors claimed a title for many years prior to this suit being brought. They conveyed the property and exercised all the acts of ownership of which the property admitted. These facts established a title by adverse possession. If not sufficient to sustain that claim then they were sufficient to justify the presumption of a grant of the fee from Bannister or his descendants. (*Roe v. Strong*, 119 N. Y. 319; *McRoberts v. Bergman*, 132 id. 73; Code Civ. Pro. § 370, subd. 3.) The property was only since 1884 taxed. It was assessed as belonging to the plaintiff. The plaintiff paid the taxes. This fact, in connection with the other facts above referred to, considering the nature of the property, makes out a *prima facie* title. (*Hager v. Hager*, 38 Barb. 92.)

EARL, J. This is an action of ejectment, commenced April 10th, 1889, to recover about thirty acres of land known as lots 4 and 5 of the second division of Rockaway Beach. The land extends along the Atlantic ocean about 1,320 feet with a depth back from the ocean of about 900 feet. In 1809 there was a partition proceeding in the Court of Common Pleas of Queens county for the partition among alleged owners of a large tract of land including this land, and in that proceeding this land was set off to Thomas Bannister in the right of his wife Rachel, and it was admitted upon the trial that both parties claimed under that partition. The plaintiff, upon the trial, gave no evidence of any conveyance from or under the Bannisters, and gave no documentary evidence connecting its title with the Bannister title. The only documentary evidence of title it gave was as follows: A deed dated January 28th, 1869, from Benjamin C. Lockwood, Jr., and his mother to Charles Donohue, and a deed from Donohue to the plaintiff, dated January 4th, 1881. There was no proof whatever showing any title in the grantors of Donohue from or under the Bannisters; and so there is no claim that the plaintiff had a documentary chain of title. The defendant claims the right of possession of the land as lessee from a grandson of the Bannisters, and the complaint alleges that he entered into possession of the land May 1, 1887, and he has ever since been in possession thereof.

The plaintiff claims title in two ways: by adverse possession, and, failing in that, by proof from which the court could presume a grant from or under the Bannisters. We think both claims of title are unfounded. This was uninclosed, uncultivated, unimproved and unoccupied land. The plaintiff and its predecessors had exercised some acts of apparent ownership upon the land. They had claimed title to the land, surveyed it, marked the boundaries thereof by monuments, from time to time cut trees upon it, and for a few years paid the taxes thereon. All these acts, as we have frequently held, fall short of showing adverse possession as defined in the Code. (Sec. 272; *Wheeler v. Spinola*, 54 N. Y. 377; *Thomp-*

son v. Burhans, 61 id. 52; *Miller v. Long Island R. R. Co.*, 71 id. 380; *Thompson v. Burhans*, 79 id. 93; *Price v. Brown*, 101 id. 669.)

The plaintiff cannot claim constructive possession of the land under section 370 of the Code, because no part of the tract was improved, and the trees cut therefrom were not cut for use upon the tract, but for use upon other land at least two miles distant.

The presumption of a grant of the land from or under the Bannisters to some one of the plaintiff's predecessors rests upon an equally slender foundation. Here there was claim of title for many years, and acts upon the land consistent with and indeed indicative of ownership. But such claim and acts, in the absence of actual or constructive possession going with them and characterized by them, have never of themselves been held sufficient to authorize the presumption of a grant from the true owner. The plaintiff's claim of title extends back less than twenty years prior to the defendant's possession. Its deeds are all modern, and any title derived from the Bannisters must have been modern as they were living in 1809. If upon such facts as exist here a grant could be presumed it would be easy for a claimant to land to get around the careful provisions of law as to adverse possession. If he failed to show facts sufficient for adverse possession, he could yet use the same inadequate facts to raise a presumption of a grant. The plaintiff's counsel places reliance upon the two cases to which he calls our attention, and which we will notice. In *Roe v. Strong* (119 N. Y. 316) there was dispute as to plaintiff's title to upland and the adjacent land under the water of Setauket bay. The plaintiff established his title to the upland bounded by high-water mark on the bay by a chain of title running back more than two hundred years, and he showed a chain of title to the land below high-water mark in front of his upland for more than one hundred years, running back to a deed from Joseph Brewster to Andrew Seaton, dated January 21, 1768, and he showed acts of ownership upon the land covered by this deed running back so far as the memory of

living witnesses could go. The land under water originally belonged to the town in which it was situated. The town had nearly two hundred years before the trial of that action conveyed away the adjacent land under water, being all the land it owned on Setauket bay, except the land covered by the Brewster deed, making a boundary upon the land covered by that deed. Under such circumstances, with others not here mentioned, this court held that a deed from the town to Brewster or some one under whom he held should be presumed, and the presumption was made in favor of the owner of the upland. That case is widely different from this. In *McRoberts v. Bergman* (132 N. Y. 73) the land in dispute was a sand beach on the lower bay of New York adjacent to the plaintiff's upland, and the beach was occupied and used in connection with the upland, and as part of the same farm, the beach and the upland constituting a single lot. The plaintiff proved a chain of title to the lot running back for much more than one hundred years. Whatever presumptions were indulged in there furnish no precedent for this case.

We are, therefore, of opinion that the plaintiff failed to show a title to the land in question sufficient for the maintenance of this action, and that the judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

In the Matter of the Charges of CORNELIUS J. RYAN against
CHARLES E. OPDYKE, JR., an Attorney.

It is the duty of the court, whenever a case is presented charging an attorney at law with dishonest conduct in his professional character, and the case is properly proved, to administer the proper punishment by removing him from his office.

(Argued October 30, 1894; decided November 27, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, entered upon an order

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made October 23, 1891, removing Charles E. Opdyke, Jr., from the office of attorney and counselor at law for deceit and fraud in the practice of his profession.

The facts, so far as material, are stated in the opinion.

Edwin Hicks for appellant. The order made by the General Term is reviewable in this court. (*Eldridge's Case*, 82 N. Y. 167.) The charges made in the name of Mr. Ryan have not been sustained. (*In re Post*, — N. Y. S. R. 641; *Kelly v. Baker*, 132 N. Y. 1; *Carroll v. Pettit*, 67 Hun, 418; *Burn v. Hock*, 21 N. Y. S. R. 974; *Lloyd v. Matthews*, 51 N. Y. 124; *In re Knapp*, 85 id. 284.)

J. W. Dunwell for respondent. "An attorney or counselor who is guilty of any deceit, malpractice, crime or misdemeanor may be suspended from practice or removed from office by the General Term thereof." (Code Civ. Pro. § 67.) "An attorney or counselor who is guilty of any deceit or collusion, * * * with intent to deceive the court or a party, is guilty of a misdemeanor." (Code Civ. Pro. § 70; 1 Wheeler Cr. Cas. 330.) The judgment of the General Term was proper. (*Ex parte Wall*, 17 Otto, 107; 107 U. S. 556.)

PECKHAM, J. Charges against the appellant, an attorney at law, were preferred to the General Term of the Supreme Court in the fifth department, and action thereon was asked for. The court by an order to show cause summoned the accused to appear before it, and the charges were denied by him upon his appearance pursuant to such order. Thereupon the court referred the matter to a referee to take the evidence in regard to the issues thus formed and to report the evidence taken together with his opinion thereon to the court. Hearings before the referee were subsequently had and the evidence submitted to him. This evidence he transmitted to the court, together with a formal report, in which he made certain findings of fact which he regarded as established by such evidence, and he also transmitted a formal opinion with the

evidence, in which opinion he stated the general result of his examination of the evidence and that the charges he mentioned therein had been proved to his satisfaction.

The whole question came before the Supreme Court at a General Term upon the report of the referee, and his opinion and the evidence taken by him, and the court after hearing the parties affirmed the referee's report and removed the accused from his office of attorney and counselor at law. From the order of removal the attorney has appealed to this court.

Upon the hearing before us his counsel has claimed that it was the right and the duty of this court to review all questions of fact arising upon conflicting evidence, and he has cited the case of *In re Eldridge* (82 N. Y. 161) as authority for that claim.

In that case section 1337 of the Code of Civil Procedure does not appear to have been cited by counsel or court and its provisions in this regard may have been overlooked.

We have, however, in this case carefully read the record which has been presented to us and have given full attention to all the evidence that was taken before the referee and returned by him to the General Term, and we are prepared to say that its perusal satisfies us that the referee and the General Term made no mistake in coming to the conclusions they did. That portion of his account as presented by the defendant and called "Schedule A" in the action which he commenced against the firm of J. O. Spencer, Son & Co., taken in connection with the examination and cross-examination of the defendant himself in regard to it, leaves no rational doubt in our minds that such account was a false one, made up by the defendant herein and for the purpose of enlarging his claim against the firm.

We are also of the opinion, arrived at from a perusal of the evidence in the case, that the defendant did not tell the truth in his complaint in that same action against the firm, and that the schedules annexed to the complaint and referred to therein as forming part thereof did not show a truthful statement of the accounts or of the services rendered by him, and that, in

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fact, he had not rendered the services charged for in a large portion of such schedules. His testimony in regard to these matters in the subsequent trials of the actions brought by and against him and tried before referees, was also, in our opinion, false, and we think he was not simply mistaken.

If such facts were properly proven before the referee and sent by him to the General Term and acted on by that court, it is clear that the order made by the court disbaring the defendant was entirely justified.

We think the proof was ample upon these points and called for the conclusions of fact arrived at by the referee in his opinion.

The testimony has been examined in this court without prejudice against the defendant and with a most anxious desire upon our part to take as charitable a view of the evidence as could fairly be reconciled with the proper discharge of our duty in the matter. We are fully impressed with the great gravity of the case and of the painful consequences to defendant which must follow our affirmance of the order of the Supreme Court. At the same time we cannot forget that it rests with the courts to aid and further the efforts on the part of the profession to maintain the honor and integrity of its own members, and whenever a case is presented which shows that an individual member of that profession has been guilty of dishonest conduct in his professional character, it is the duty of the court, when the case is properly proved, to administer the proper punishment. This is not only justice to the profession itself, but it is a protection to the public which ought to be justified in its belief that any one holding a license to practice in the courts of this state is at least of good moral character and fit to be intrusted with the duty of protecting the interests of others.

The order of the Supreme Court should be affirmed.

All concur.

Order affirmed.

THE VILLAGE OF PELHAM MANOR, Appellant, v. THE NEW ROCHELLE WATER COMPANY, Respondent.

The provision of that article of the Transportation Corporations Act relating to water works corporations (Art. 7, § 2, chap. 566, Laws of 1890) which authorizes such corporations when they have obtained the permit required by the article (§ 80) "to lay their water pipes in any street * * * of an adjoining town or village," is not limited to cases where an adjoining town or village intervenes between the source of supply and the town or village to be supplied, and it is necessary, in order to carry the water to the village or town granting the permit, to lay the pipes in the streets of the adjoining town or village; but the authority may be exercised by such a corporation whenever it is necessary to lay the pipes in those streets in order to effectually and properly execute the purpose for which it was created.

In an action to restrain defendant, a water works company, organized to supply a village adjoining plaintiff, from using one of plaintiff's streets in which defendant had laid its pipes without plaintiff's consent, it appeared that defendant laid its pipes in the street for the purpose of connecting two of its mains which terminated in "dead ends" near the boundary line of the two villages; this connection completed the circuit, added greatly to the pressure, and furnished running instead of stagnant water. The court found that in order to perform the purpose of its incorporation it was necessary for defendant to lay its pipes in the street in question. *Held*, that such a use of the street was within the scope of defendant's authority; and so, that the action was not maintainable.

Reported below, 67 Hun, 98.

(Argued October 19, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 13, 1893, which affirmed a judgment in favor of defendant entered upon a decision of the court dismissing the complaint on trial at Special Term.

This action was brought to restrain defendant, a corporation organized for the purpose of supplying plaintiff with water, from laying its water mains in the Boston Post road within plaintiff's municipal limits.

The facts, so far as material, are stated in the opinion.

Jabish Holmes, Jr., for appellant. The statute only authorized a water company to lay its pipes in the streets of an adjoining village in order to get from its source of supply to the village to be supplied. (Laws of 1892, chap. 617; *Cameron v. N. Y. & M. V. W. Co.*, 133 N. Y. 366; *People v. Jaehne*, 103 id. 197; *Smith v. People*, 47 id. 336; *In re B. E. R. R. Co.*, 25 id. 444.) The construction given to the section by the court below, that defendant can use any and all of the streets of Pelham Manor simply because it adjoins New Rochelle, and that it is immaterial whether the pipe is necessary to enable defendant to get from its water works or source of supply to New Rochelle, is untenable. (*People ex rel. v. Newton*, 112 N. Y. 396; *People v. Thompson*, 98 id. 6; *Wood v. Lacombe*, 99 id. 49; *McGaffin v. City of Cohoes*, 74 id. 389; *Tracy v. T., etc., R. R. Co.*, 38 id. 437; *L. S. & M. S. R. Co. v. Roach*, 80 id. 344; *Riggs v. Palmer*, 115 id. 506.) Plaintiff is entitled to an injunction to restrain the illegal act of defendant. (*Davis v. Mayor, etc.*, 14 N. Y. 524; *Milhan v. Sharp*, 27 id. 611; *People v. Kerr*, Id. 193; *Milburn v. Fowler*, 27 Hun, 568; *Van Brunt v. Town of Flatbush*, 128 N. Y. 50; *Wheelock v. Noonan*, 108 id. 183; *City of Cohoes v. D. & H. C. Co.*, 134 id. 408; *People v. E. G. L. Co.*, 141 id. 238; *People v. T. A. R. R. Co.*, 112 id. 403; *Town of Mentz v. Cook*, 108 id. 504; *Ostrander v. Weber*, 114 id. 56; *B. S. & C. Co. v. D., L. & W. R. R. Co.*, 130 id. 152; *W. S. Bank v. Town of Solon*, 136 id. 473.)

Martin J. Keogh for respondent. As to public bodies and quasi public corporations equity will not interfere with the exercise of their lawful powers, unless the acts complained of are clearly illegal, or unless the statute under which they are acting is void, or unless irreparable loss and damage are clearly and positively established. (*P. P. & C. I. R. R. Co. v. Williamson*, 24 Hun, 216; *In re N. R. W. Co.*, 46 id. 552; *Village of Tarrytown v. P. W. W. Co.*, 15 N. Y. S. R. 816.) Where a corporation is clothed with certain powers and has

imposed upon it certain duties, with respect to any public work, and is proceeding within the scope of its authority, in good faith, a court of equity will not interfere by injunction unless it can be shown clearly and positively that irreparable loss and damage will result. (*Morgan v. City of Binghamton*, 102 N. Y. 500; *P. P. & C. I. R. R. Co. v. Williamson*, 24 Hun, 216; *Baxter v. S. D. R. R. Co.*, 61 Barb. 428; *Hodgkinson v. L. I. R. R. Co.*, 4 Edw. Ch. 411; *Davis v. A. Society*, 75 N. Y. 362.) The court has found that it was absolutely necessary for sanitary reasons for defendant to complete its circuit by laying its pipes through Pelhamdale avenue. The court cannot review these findings. The exceptions thereto are unavailing because they state no ground upon which the exceptions are based. (*Keogh v. Westervelt*, 66 N. Y. 636; *Chester v. Dickenson*, 54 id. 13; *Travis v. Travis*, 122 id. 449; *Aldridge v. Aldridge*, 120 id. 614; *Newell v. Doty*, 33 id. 83; *Ward v. Craig*, 87 id. 550.)

O'BRIEN, J. The equitable relief which the plaintiff sought to obtain in this action was to restrain the defendant from the use of one of the highways within the corporate limits of the plaintiff and known as the Boston Turnpike road. This highway was under the exclusive care and control of the plaintiff's board of trustees. The defendant is a corporation organized under chapter 737 of the Laws of 1873, for the purpose of supplying the village of New Rochelle with water, and it now exists under the act of its creation, which subsequently became incorporated into and a part of the general statute on this subject. (Laws of 1890, ch. 566, art. 7, § 2; *Caeron v. N. Y. & Mount Vernon Water Co.*, 133 N. Y. 336.) The village of Pelham Manor and the village of New Rochelle are adjoining villages, and the claim of the plaintiff is that the defendant had no power or authority to lay down its water pipes or mains in the highway in question or use it for the purpose of executing the purpose of its incorporation, without the plaintiff's permission, expressed through its constituted municipal authorities. This permis-

sion was not obtained, and if it was necessary the plaintiff had the right to protect its streets and highways from any unauthorized interference on the part of the defendant. Among the powers conferred upon the defendant by the acts of 1873 and 1890, above referred to, is the authority "to lay and maintain their pipes and hydrants for delivering and distributing water in any street, highway or public place of any town or village in which it has obtained the permit required by section 80." This provision authorized the defendant to use the streets and highways of New Rochelle, but not of any other village or town. But by another section of the act water companies are also authorized "to lay their water pipes in any streets or avenues or public places of an adjoining town or village to the town or village where such permit has been obtained."

It was under this last provision that the defendant claimed the right to occupy the highway in question. The defendant's position has been sustained by the court below, and obviously the controversy turns upon the proper construction of this statute. The contention of the plaintiff is that the statute only permits the defendant to lay its pipes in the streets of an adjoining town when it is necessary to reach the village granting the permit from the source of supply. In other words, that when an adjoining town intervenes between the source of supply and the village or town to be supplied then the company may use the streets of the adjoining village or town, but not otherwise. It is said in support of this position that the statute could not have intended that a company such as the defendant should have the right to use the streets of an adjoining town to any extent that it thought necessary unless in passing from the source of supply to the point of distribution. The defendant had no franchise to supply the plaintiff with water, and the legislature did not anticipate any abuse of the power to lay pipes in an adjoining town by a corporation that could not carry on its operations there or receive any revenue from such town or its inhabitants. The question is whether it was not the intention of the legisla-

ture to permit the defendant to do what it did when it became necessary in order to effectively and properly execute the purpose for which it was created. The defendant was bound by the conditions of its incorporation and by contract to supply the village and town of New Rochelle and the inhabitants thereof with pure and wholesome water, and the trial court has found that in order to perform that duty it became necessary to lay its pipes under the road in question. What the defendant did was to use the road for about five hundred feet in order to connect two of its mains which terminated in "dead ends" near the boundary line of the two towns. This connection completed the circuit and added greatly to the pressure besides furnishing running instead of stagnant water. So long as the defendant was without power to add to its revenues by furnishing water to the plaintiff or any of its inhabitants no great mischief is to be apprehended from any extensive use of the streets by the defendant. But the legislature evidently anticipated that a water company in performing its functions of supplying the town, and every part of it which granted the permit, with water might, for some reason, find it necessary to cross the boundary line of an adjoining town and use its highways, not for the purpose of supplying that town, but for the purpose of properly and effectively executing the purpose of its creation. Such necessity has been found in this case as matter of fact by the trial court, and hence the permission of the municipal authorities who had charge and control of the highway was not necessary. To hold that the power to go into an adjoining town was limited to cases where such town intervened between the point of supply and distribution would be adhering too closely to a literal or grammatical construction and would ignore the public and beneficial purpose of the statute. In this case it became necessary, in order to supply New Rochelle with pure and wholesome water, to cross the town line and use a highway within the plaintiff's corporate limits for five hundred feet. We think that the statute, fairly and reasonably construed, conferred the power upon the defendant although the point in

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Statement of case.

the adjoining town where the extension was made did not intervene between the source of supply and the place of distribution.

The judgment should, therefore, be affirmed, with costs.

All concur.

Judgment affirmed. _____

THE UNITED STATES VINEGAR COMPANY, Respondent, v. JOHN SCHLEGEL, Appellant.

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Where evidence tending to prove a material fact at issue in an action, but which requires proof of other facts to complete the chain of proof, is received under objection, and such other facts are not proved, the presence of the evidence in the record is no ground for reversal in the absence of a motion to strike it out.

The fact that promoters engaged in organizing a corporation in another state deceived the authorities of that state as to their real purpose in forming the corporation, and so procured them to file the necessary papers and take the necessary steps to give the organization a corporate existence, is no defense to an action brought by the corporation in this state upon an indebtedness to the corporation.

So long as the corporation exists and is recognized by the state of its origin it is entitled to the same recognition here, unless it appears that it was formed for purposes illegal here, or was doing acts prohibited by the laws of this state to its own citizens and corporations.

A party who has entered into a contract with another, in which the latter assumes to be and contracts as a corporation, is estopped from denying the corporate existence.

In an action brought by a corporation of another state to recover upon a subscription to its capital stock one defense was that plaintiff was incorporated for an illegal purpose. There was no proof of any corporate act pointing to any illegal purpose or object. The proof on that point was a printed prospectus issued by certain promoters of the company, a blank form of contract to be used, and numerous acts and declarations by them before the corporation was created. It did not appear that these were ever adopted or acted upon by the corporation. *Held*, that the defense was not sustained; that such documents, acts and declarations could not be used to defeat contracts made with or obligations incurred by an individual to the corporation; and so, it was immaterial whether they furnished evidence of any illegal purpose by any one.

Reported below, 67 Hun, 356.

(Argued October 18, 1894; decided November 27, 1894.)

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APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 17, 1893, which overruled defendant's exceptions and ordered judgment in favor of plaintiff on verdict directed by the court.

This action was brought by plaintiff, a corporation organized under the laws of Illinois, to recover an unpaid subscription to its stock by defendant, who is a resident of this state, and was one of plaintiff's incorporators and original subscribers to its capital stock.

The facts, so far as material, are stated in the opinion.

Benno Lowey for appellant. The contract sued upon must be construed and its validity determined according to the rules of the common law, and irrespective of the statutes of Illinois or of New York governing stock subscriptions or corporations. If the subscription was for the purpose of forming a corporation for an illegal purpose it is void, and the courts will consider the real purposes of the corporation, irrespective of its nominal objects as disclosed by the certificate of incorporation. (*McGrew v. C. P. Exchange*, 85 Tenn. 574; *Montgomery v. Forbes*, 148 Mass. 249; *Hill v. Beach*, 12 N. J. Eq. 31; *J. C. G. Co. v. Dwight*, 29 id. 242; *O. R. Co. v. O. R. Co.*, 130 U. S. 1; *S. L. C. Soc. v. Hennessy*, 11 Mo. App. 555.) The evident object of the formation of the plaintiff was to create a monopoly, to control and limit the production of an article of necessity and to enhance its price. The plaintiff was, therefore, not formed for a legal or lawful purpose. (*People v. Sheldon*, 139 N. Y. 251; *M. R. C. Co. v. B. C. Co.*, 68 Penn. St. 173; *Hooker v. Vandewater*, 4 Den. 349; *Leonard v. Poole*, 114 N. Y. 371; *Richardson v. Buhl*, 77 Mich. 632; *Craft v. McCononghy*, 79 Ill. 346.) If the real purposes and objects of the formation of plaintiff were illegal, or against public policy, it never was legally a corporation, and all acts purporting to create it such were null, void, and of no effect. (*People ex rel. v. C. G. Co.*, 130 Ill. 168; *S. C. V. M. & L. Co. v. Hays*, 76 Cal. 387; *P. F. Co.*

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v. *Adler*, 90 id. 110; *Chapin v. Brown*, 83 Iowa, 156; *Emery v. O. C. Co.*, 47 Ohio St. 320; *M. R. C. Co. v. B. C. Co.*, 68 Penn. St. 173; *People v. Sheldon*, 139 N. Y. 251; *Leonard v. Poole*, 114 id. 371; *People v. N. R. S. R. Co.*, 22 Abb. [N. C.] 199; *Stanton v. Allen*, 5 Den. 443.) The fact that this company commenced and did business for some little time does not affect the question. If the purpose of the corporation were illegal, mere continuance of corporate existence and acts done by the corporation does not make this purpose legal, nor will the court for such reason enforce the illegal contracts. (*O. R. Co. v. O. R. Co.*, 130 U. S. 1; *Thomas v. R. R. Co.*, 101 id. 71.) There was no proof in the case of the incorporation of the plaintiff. There is no presumption that the statutes of New York have been enacted in a sister state. In the absence of proof as to the law of a sister state, the courts of this state will presume that the common law of England was in force. (*Waldron v. Ritchings*, 3 Daly, 288; *Abell v. Douglas*, 4 Den. 305; *Throop v. Hatch*, 3 Abb. Pr. 23; *Davis v. Garr*, 6 N. Y. 124; *Merrill v. Tice*, 104 U. S. 557; *Parr v. Greenbush*, 72 N. Y. 461.) If, after one has signed a contract of subscription to stock to a proposed corporation, the objects for which the company is formed are changed, he is not bound by his subscription, because the company formed is not the company he subscribed to. (*Dorris v. Sweeney*, 60 N. Y. 463.) There is no proof that the subscription was ever assigned to the plaintiff as alleged, nor that any calls were ever made for the ninety per cent balance upon the defendant's subscription as provided by the prospectus. (*Banet v. A. & S. R. R. Co.*, 13 Ill. 504; *L. Ins. Co. v. Moore*, 84 id. 577.) Unless, in every possible aspect of the case, the defendant could not recover, the court was bound to submit the case to the jury. (*Massoth v. D. & H. C. Co.*, 64 N. Y. 524; *Maher v. C. P., N. & E. R. R. Co.*, 67 id. 54; *Hays v. Miller*, 70 id. 112; *Dolan v. D. & H. C. Co.*, 71 id. 285; *Hart v. H. R. B. Co.*, 80 id. 622; *Payne v. D. & B. R. R. Co.*, 83 id. 572; *Cosgrove v. N. Y. C. & H. R. R. Co.*, 87 id. 88; *Schneider*

v. *N. Y. C. & H. R. R. Co.*, 90 id. 558; *Cohen v. Plonsky*, 60 Hun, 103.)

S. R. Ten Eyck for respondent. The due incorporation of the plaintiff is clearly shown by the certificate of the secretary of the state of Illinois, under whom it was created. (2 Waterman on Corp. § 201; Morawitz on Corp. § 750; *Dutchess v. Davis*, 14 Johns. 233; *S. B. R. R. Co. v. Hamlin*, 24 Hun, 394; *C. Bank v. Pleiffer*, 22 id. 334; 108 N. Y. 242-252; *Eaton v. Aspinwall*, 19 id. 199; *B. & A. R. R. Co. v. Cury*, 26 id. 75; *Whitford v. Laidler*, 94 id. 151; *Vedder v. Mudgett*, 95 id. 310; *Craven v. E. M. Co.*, 21 N. E. Rep. 984; *Vulcan v. Myers*, 58 Hun, 161.) An agreement to take shares in a corporation about to be formed is valid, and may be enforced by the company after its incorporation without any allotment of its stock, and without any previous demand for payment of the subscription. (*B. & N. Y. R. R. Co. v. Dudley*, 14 N. Y. 336; *P. W. Co. v. Badger*, 67 id. 294; *B. & J. R. R. Co. v. Gifford*, 87 id. 294; *L. O. R. R. Co. v. Mason*, 16 id. 451.) The defendant's subscription is absolute in its terms, and cannot be varied or contradicted by parol evidence. (*P. W. Co. v. Badger*, 6 Hun, 293; *B. R. R. Co. v. Dudley*, 4 Kern. 336.) The plaintiff was organized for a legal purpose, and that purpose cannot be changed into an illegal one by any acts or declarations of its promoters. (*Munson v. S. G. & C. R. R. Co.*, 103 N. Y. 58.) Assuming that the court has a right to go behind the charter of the plaintiff, and consider all the evidence in the case for the purpose of determining the real objects of the plaintiff's formation, still we claim that nothing of an illegal nature is shown. (*People v. N. R. S. R. Co.*, 54 Hun, 370; *Richardson v. Buhle*, 77 Mich. 632; *Hopkins v. Ensign*, 122 N. Y. 144.) As against the creditors of the plaintiff, the defendant is estopped from asserting that it was formed for an illegal purpose. (*P. C. Co. v. McMillin*, 119 N. Y. 46; *P. W. Co. v. Badger*, 67 id. 294.)

O'BRIEN, J. The trial court directed a verdict for the plaintiff for the amount which the defendant had duly subscribed as a shareholder of the plaintiff's capital stock, to recover which the action was brought. There is no dispute about the fact that the defendant did subscribe in writing for twenty shares of the capital stock, for which he agreed to pay \$2,000. The plaintiff, before this action was commenced, had incurred debts and become insolvent, and subsequently went into the hands of a receiver. The defense stated in the answer is substantially that the plaintiff was incorporated for the illegal purpose of combining all the dealers in vinegar, to the end that the production could be limited and controlled and the price artificially enhanced, and that the defendant was induced by fraud to subscribe for the stock. It is also claimed that the plaintiff never became incorporated. In brief, the defendant's position is, first, that the plaintiff was incorporated for an illegal purpose, and, secondly, that it has not been incorporated at all. These defenses are of course inconsistent with each other, but the defendant had the right to interpose all the defenses that he had, whether they were consistent with each other or not. It is unnecessary to make further reference to the defense of fraud, as there was no evidence on that question to submit to the jury, and no request was made by the defendant's counsel to have it submitted. There was no proof of any corporate act pointing to any illegal purpose or object in the formation of the company. The proof on that point consisted of a printed prospectus issued by certain promoters of the company, a blank form of contract to be used, and numerous acts and declarations made by them before the corporation was created. It is not necessary to inquire whether these documents or those acts and declarations furnish any evidence of an illegal purpose on the part of any one. It is quite sufficient to observe that, so far as the record shows, they were never adopted or acted upon by the corporation itself, and, therefore, cannot now be used to defeat contracts made with, or obligations incurred by, individuals to the corporation. (*Munson v. S. G. & C. R. R. Co.*, 103 N. Y. 58.)

It is suggested, as a phase of the defense, that the promoters deceived the authorities of the state of Illinois as to their real purpose in forming the corporation, and in that way procured them to file the necessary papers and take the necessary steps to give the plaintiff a corporate existence. The suggestion has little if any support in the evidence, but even if the fact had been established, it would constitute no defense to this action. That state must be left to vindicate its own honor and dignity. If it be true that its authority has been invoked and its laws abused for the purpose of creating and fostering a corporation that is detrimental to public interests, it has ample power at any time to proceed against it and decree its dissolution. But so long as the plaintiff exists and is recognized by the courts and authorities of that state it is entitled to the same recognition here, unless it appears that it was formed for purposes illegal here, or was doing acts prohibited by the laws of this state to its own citizens and corporations. (*Demarest v. Flack*, 128 N. Y. 205.)

A foreign corporation, such as the defendant claims this to be, may be driven from the state by public authority, but it does not follow that for such reason all the contracts that private individuals have made with it, or the obligations that they may have incurred to it or its creditors, are invalidated. The certificate of incorporation filed by the corporators with the secretary of state of Illinois in March, 1887, declares that the object for which the corporation was formed is to buy, sell, deal in and handle vinegar. There was certainly nothing illegal in such object, and if the corporation afterward departed from the purpose of its creation and entered upon projects which were illegal, this misconduct must be corrected in some other way than in a suit against the defendant to recover his subscription. That might furnish good grounds for a suit by the People to vacate the charter, but no defense whatever to a stockholder when sued for his subscription. The only substantial question in the case is whether the plaintiff has proved its existence as a corporation. Its corporate character is properly averred in the complaint. The plaintiff's

counsel suggests that the fact is admitted, since the defendant in his answer has denied it only on information and belief. Under § 1776 of the Code, a mere denial in any form is not sufficient to raise an issue on such a question. The answer must contain an affirmative allegation to the effect that the plaintiff is not a corporation, and in this case the answer does contain such an allegation in connection with other matters. The plaintiff was, therefore, bound to prove its incorporation. The certificate of the secretary of state of Illinois was produced, which stated that the plaintiff was duly incorporated. Also a certificate signed and acknowledged by five persons described as incorporators, duly filed in the same office. But there was no proof that by the law of Illinois these papers established the plaintiff's corporate character, and, hence, this proof was not sufficient. There was proof, however, of the user by the plaintiff of corporate powers, and two written contracts were produced executed by the plaintiff and defendant after the subscription was made. In both of these instruments it was stated that the plaintiff was a corporation. They related to the manufacture and sale of vinegar, and contained, with considerable detail, mutual stipulations to be observed by each party. The defendant having dealt and contracted with the plaintiff as a corporation, that fact furnished some evidence of the plaintiff's corporate existence, or, at least, estopped the defendant from denying it. (*Phoenix W. Co. v. Badger*, 67 N. Y. 298; *Com. Bk. v. Pfeiffer*, 22 Hun, 334; *S. C. affd.*, 108 N. Y. 242-252; *Eaton v. Aspinwall*, 19 id. 119; *B. & A. R. R. Co. v. Cary*, 26 id. 75.)

These contracts were acts performed and admissions by both parties which necessarily assumed the plaintiff's corporate character, and, as against the defendant, operated to prove that plaintiff was, as stated in the agreement, a corporation upon a principle somewhat analagous, that acts done by a corporation which require the existence of other acts to make them legally operative, are presumptive proof of the latter. (*Demings v. Supreme Lodge, etc.*, 131 N. Y. 522; *Pringle v.*

Woolworth, 90 id. 510; *Bank of the U. S. v. Dandridge*, 12 Wheat. 79.)

The plaintiff's corporate character was, therefore, *prima facie* established, and, as nothing was shown by the defendant in contradiction, there was no question on that issue to submit to the jury. The documents from the office of the secretary of state of Illinois were received in evidence against the defendant's objection and exception. In order to give them proper effect they should have been supplemented by proof of the law of that state, but they were competent as part of the chain of proof on the issue. When the plaintiff failed to follow them up by proof of the law which gave them efficacy, a motion to strike out was the defendant's remedy, and no such motion was made. When evidence tending to prove a material fact in issue is received under objection, and which requires proof of other facts to make it complete, which have not been supplied, its presence in the record is no ground for reversal in the absence of a motion subsequently to strike it out. The failure of the plaintiff to supplement the documentary evidence with proof of the law should have been raised by such a motion, as the ruling admitting the papers was correct when made. There are no other questions in the case that would warrant a new trial or that require any special notice.

The judgment must be affirmed, with costs.

All concur.

Judgment affirmed. _____

MICHAEL R. DINAN, Appellant, v. WILLIAM CONEYS et al.,
Respondents.

Where in an action of ejectment plaintiff claimed title under a devise in a will by which a legacy was given to one of the defendants and made chargeable upon the real estate in question, *held*, that the legacy did not constitute a counterclaim; also, that plaintiff was not required to demur to the answer setting it up as a counterclaim in order to raise the question, nor did he, by replying, waive his right to take the objection. *Dinan v. Coneyes* (67 Hun, 141), reversed.

(Argued October 26, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 13, 1893, which affirmed a judgment in favor of plaintiff, except as to the claim of the defendant Hannah Coneys, entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Garrett Z. Snider for appellant. Under the procedure prior to the Code, an equitable title could not be set up in defense to the legal title of the plaintiff. (*Jackson v. Deyo*, 3 Johns. 422; *Jackson v. Van Slyck*, 8 id. 487.) The answers did not contain counterclaims. (Code Civ. Pro. §§ 500, 501, 503.) Assuming the answers were not proper, plaintiff was not compelled to demur, nor by replying did he waive his right to object to them at any stage of the action. (*Smith v. Hall*, 67 N. Y. 48; *People v. Dennison*, 84 id. 273.)

A. & A. X. Fallon for respondent. The defendant Hannah Coneys was entitled to judgment for the amount given to her by the will, with interest on the same, as stated in the report of the referee, as it was a charge upon the real estate devised by the testator to the plaintiff. (*Lupton v. Lupton*, 2 Johns. Ch. 614; *Meyer v. Eddy*, 47 Barb. 263; *Bevan v. Cooper*, 72 N. Y. 317-325; *Hoyt v. Hoyt*, 85 id. 142, 147; *McCorn v. McCorn*, 30 Hun, 171; *Waddell v. Darling*, 51 id. 327; *Wait's Act. & Def.* 531.) The claim of the defendant Hannah Coneys, stated in her answer, arises out of the same clause of the will by which the plaintiff took title to the premises, which were devised to him upon condition that he paid her the amount of the bequest to her, and was, therefore, connected with the subject of the action. No demurrer was interposed by the plaintiff to the defendant's answer, and no objection was made on the trial before the referee. (Code Civ. Pro. § 501; *Fettrick v. Makay*, 47 N. Y. 426; *Carpenter v. M. Ins. Co.*, 93 id. 552.) The plaintiff's claim, that the defendant Hannah Coneys was not entitled to the judgment

for the amount given to her in the will, is unfounded, because the court has a right to give her judgment for the amount confessedly due to her without putting her to separate action to recover the same. (*Dobson v. Pearce*, 12 N. Y. 156; *Crary v. Goodman*, 11d. 266; *H. R. R. Co. v. L. I. R. R. Co.*, 48 Barb. 438; *Bogardus v. Parker*, 7 How. Pr. 303; *Dewey v. Hoag*, 8 Barb. 365; *Thompson v. Lander*, 118 N. Y. 252; *Litchult v. Tredwell*, 74 id. 603.)

ANDREWS, Ch. J. This action is ejectment. The plaintiff claimed title under a devise in the will of his father, Daniel Dinan, and in his complaint alleged the devise as the source of his title. The defendant Hannah Coneys is the wife of the defendant William Coneys and the sister of the plaintiff. In her answer she denied that she unlawfully withheld possession of the premises, and alleged that by the will of Daniel Dinan the land devised to the plaintiff was charged with the payment to her of a legacy of three hundred dollars, which had not been paid, and she demanded judgment in her favor against the plaintiff for the amount of the legacy, with interest. The plaintiff replied, and, after admitting that the devise was subject to the charge, averred that the defendant had remained in the possession of the premises after the death of the testator, and received the rents and profits under an agreement with the plaintiff that they should be applied in payment of the legacy, and that the rents and profits received by her had been more than sufficient to satisfy it. The referee to whom the action was referred decided that the plaintiff was entitled to judgment for the possession of the premises, and the defendant Hannah Coneys to a judgment in her favor against the plaintiff for the amount of the legacy, with interest. Judgment was entered in conformity to the report. The plaintiff appealed. The General Term affirmed the judgment with a modification to the effect that the premises be sold to satisfy the legacy. The plaintiff then appealed to this court from the judgment rendered by the General Term.

The question presented is whether the legacy constituted a

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counterclaim under the Code. If it was not available as a counterclaim, the plaintiff did not by replying to the answer waive his right to take the objection on the trial, nor was he compelled to demur in order to raise the question. (*Smith v. Hall*, 67 N. Y. 48; *People v. Dennison*, 84 id. 273.) We think the legacy was not a counterclaim in the action, *first*, because it did not tend to diminish or defeat the plaintiff's recovery, and, *second*, because it was not a cause of action accruing out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, nor was it connected with the subject of the action. (Code, § 501.) The plaintiff by the acceptance of the devise became personally liable as upon contract, to pay the legacy (*Brown v. Knapp*, 79 N. Y. 136), and it was a charge also upon the land, which could be enforced in equity. But the fact that the plaintiff had become personally bound to pay the legacy did not make the legacy a counterclaim under the second subdivision of section 501, as that subdivision only applies where the action of the plaintiff is on contract also. The subject-matter of the plaintiff's action was the alleged right of possession of the land sought to be recovered. The subject-matter of the counterclaim was the right to recover against the plaintiff the amount of the legacy, and also (in view of the modification made by the General Term) the right to relief by sale of the land for its payment. The right of the plaintiff to possession of the land was in no way qualified by the fact that a legacy was charged thereon. The existence of the legacy gave the legatee no right of possession as against the plaintiff, whether the legacy was paid or not, and being in possession did not justify her in withholding possession from the plaintiff, the owner of the legal title. Nor did the existence of the legacy tend in any way to diminish or defeat the plaintiff's recovery. He took an incumbered title, but he had a right to the possession and the existence of the incumbrance in no way affected that right. The defendant Hannah Coneys was not in the situation of a mortgagee in possession. The mortgagee under the old law had a defeasible estate

in the land mortgaged, and being in possession could defend his possession under the mortgage; and the change made by our law, which makes the mortgage a security merely, has not abrogated the mortgagee's right when in possession of the pledge, to retain it after default, until the debt for which the mortgage is held shall be satisfied. This rule is justified by the presumed intention of the parties and the nature of the transaction. But a legatee, whose legacy is charged on land, holds no relation thereto corresponding with that of a mortgagee in possession. He has it is true a lien. So has a judgment creditor. But it could not be claimed that the latter could before sale lawfully take possession of the lands of the judgment debtor under the judgment, or defend an ejectment brought by him to recover it. One of the definitions of a counterclaim in the 2nd subdivision of section 501 is "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim." The transaction set forth in the complaint as the foundation of the plaintiff's claim is title acquired under the devise in the will of Daniel Dinan and the withholding of possession by the defendants. Upon that title he founds his right to the possession of the land. The legacy given to Hannah Coneys is given by the same will, and is thereby charged on the land devised to the plaintiff. But the right of the plaintiff to the possession of the land, and of the defendant to the legacy are wholly distinct and independent claims. The giving of the legacy, as has been said, did not qualify the devise so as to affect the right of possession. The claim of the legatee does not arise out of the transaction upon which the plaintiff relies, although both claims had a common origin and were coincident in the time of their creation. Moreover, under both subdivisions of section 501, the counterclaim presented must "tend in some way to diminish or defeat the plaintiff's recovery." The right of the plaintiff to recover the possession of the land is neither diminished nor defeated by the existence of the legacy. He is entitled to possession,

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notwithstanding the legacy, and this the judgment awards him.

We think the original judgment against the plaintiff was not sanctioned by the law of counterclaim, and that the modification by the General Term, which turns the defense into an action in equity to enforce the charge, was a still further departure from the statute. While the statute of counterclaim ought to be liberally construed in the interest of peace and to suppress unnecessary litigation, it does not, we think, justify the application made in this case.

The judgments of the courts below should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgments reversed.

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JOHN W. DIBBLE, Respondent, v. JEREMIAH W. DIMICK,
Appellant.

Where on appeal from a judgment entered on the report of a referee the appellant desires a review of the facts, he must insert in the record a statement that it contains all the evidence or all that is material to the question sought to be reviewed.

No particular form of words, however, is required for this statement, and where there is a statement in the record that it contains all the testimony, and both parties proceed to argument without any objection as to the power of the General Term over the whole case, the court is warranted in assuming that all the evidence is in the case and should pass upon the facts.

Where the record contained a statement that it contained all the testimony, and the order of the General Term was a general affirmance of the judgment without specifying the grounds or in any way limiting its legal effect, *held*, that the order imported that every question in the case both of law and fact had been disposed of; that to raise the point here that the General Term refused to review the facts for want of a proper and sufficient record, this should appear by a proper statement in the order, and that the fact that this appeared in the opinion of the General Term was not sufficient.

Where by agreement between the parties, the compensation of plaintiff as salesman for defendant was to be a commission on sales, *held*, that plaintiff was entitled to commissions on orders for goods solicited and obtained by him, although the goods were not delivered by defendant until after

plaintiff's discharge, and the commissions were by the agreement not payable until delivery.

In an action by an employee to recover an amount claimed to be due under a contract of employment, a settlement, an accord and satisfaction, or payment in full are affirmative defenses, and where not pleaded, evidence properly received as bearing upon the terms of the contract may not be used to establish such a defense.

Reported below, 4 Misc. Rep. 190.

(Argued October 15, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the City and County of New York, entered upon an order made June 5, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover commissions claimed to be due plaintiff as a salesman in defendant's employ.

The facts, so far as material, are stated in the opinion.

E. W. Tyler for appellant. The referee found facts unsupported by any testimony, which findings were duly excepted to by the defendant, and the General Term erroneously refused to review the testimony, thus presenting a pure question of law. (*Halpin v. P. Ins. Co.*, 118 N. Y. 165.)

Ira G. Darrin for respondent. An appellate court will not review the findings of a referee on questions of fact where the appellant fails to insert a statement in the case that the same contains all the evidence introduced upon the trial. (*Aldridge v. Aldridge*, 120 N. Y. 614.) To justify a reversal it must appear that the findings of the trial court were against the weight of evidence or that the proofs so clearly preponderated in favor of a contrary result that it can be said with a reasonable degree of certainty that the trial court erred in its conclusions. (*Godfrey v. Moser*, 66 N. Y. 250; *Crane v. Baudouine*, 55 id. 256; *Sherwood v. Hauser*, 94 id. 626; *Westerlo v. De Witt*, 36 id. 340.) The defense of accord and satisfaction is not available in this case to secure a reversal of the judgment for the reason that the defendant failed to plead

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it as a defense. The rule that under the Code new matter constituting a defense must be pleaded, and is not available under a general denial, is too well settled for discussion. (*McKyring v. Bull*, 16 N. Y. 297-309; *Wheaton v. Nelson*, 77 Mass. 15; Abb. Trial Brief on Pleading, § 765.) The defendant having introduced evidence by the testimony of himself and his son that the plaintiff's contract had never been modified, the referee having so found, and the defendant having taken no exception to such finding, he cannot successfully contend that the contract was modified, because of the mere fact that the plaintiff received payments under protest at a lower rate than that provided by the contract. Such a one-sided modification of a contract would be without consideration and void. (*West v. Van Tuyl*, 119 N. Y. 620; *Crosby v. Wood*, 6 id. 369; 2 Pars. on Cont. 437; *Reynolds v. Nugent*, 25 Ind. 328; *Harris v. Carter*, 3 El. & Bl. 559; *Vanderbilt v. Schreyer*, 81 N. Y. 392.) Plaintiff is entitled to commissions on sales made by the defendant upon orders solicited and obtained by plaintiff where the goods were delivered after his discharge. (Bishop on Cont. § 1431; 1 Whart. on Cont. § 692; 2 Pars. on Cont. [2d ed.] 523; *Resley v. Smith*, 64 N. Y. 576; *Gallagher v. Nichols*, 60 id. 438, 448; *Lawrence v. Miller*, 86 id. 131; *U. S. v. Peck*, 12 Otto, 65; 102 U. S. 46; *Devlin v. Mayor, etc.*, 63 N. Y. 9.) Every presumption is to be indulged in favor of the judgment. (*S. O. Co. v. T. Ins. Co.*, 64 N. Y. 85; *Tracy v. Altmayer*, 46 id. 598, 604; *Appleby v. E. C. S. Bank*, 62 id. 12; *Briant v. Trimmer*, 47 id. 96; *Carman v. Pultz*, 21 id. 547; *Sheldon v. Sherman*, 42 id. 484; *Westerlo v. De Witt*, 3 id. 340.)

O'BRIEN, J. The plaintiff recovered in this case a balance which he claimed was due to him for compensation as a salesman in the employ of the defendant. The issue presented by the pleadings was one of fact involving the terms and conditions of the original contract under which the service was performed. The complaint alleged that the plaintiff had performed services for the defendant as a salesman at his express

request from November 15th, 1889, to January 20th, 1891, and that such services were of the value and were rendered for the agreed compensation of \$4,100. That the plaintiff had been paid the sum of \$2,430.41, and that the balance, with interest, was due and unpaid.

The answer admitted that the services were rendered, that the payment referred to in the complaint had been made, and denied that there was any further sum due to the plaintiff or that the sum stated in the complaint had been agreed upon by the parties as the compensation. The question to be tried, therefore, was the issue thus made in regard to the terms of the agreement. Both parties claimed that the plaintiff entered into the defendant's service under a verbal contract, but they differed widely as to its terms. The plaintiff claimed that he was to be paid upon the basis of commissions upon the sales at the rate of two per cent with a guaranty of \$1,500 per year salary. The defendant claimed that the commissions were not to exceed one per cent on all sales made at wholesale, and two per cent on those made at retail. The amount of the commissions was, therefore, the vital point upon which they differed, and each party supported his version as to the terms of the contract by his testimony. If the defendant's version was correct the action was defended. If the plaintiff's was the true one he was entitled to recover the amount awarded to him by the referee. The parties were in direct conflict as to the fact, and the burden of proof was upon the plaintiff. The defendant gave some proof in corroboration of his version of the agreement. It was shown and found by the referee that at various times after the first of November, 1890, the plaintiff had been paid commissions which he had himself computed upon the basis of one per cent upon some of the sales and two per cent upon others. The plaintiff attempted to explain this by testifying that the defendant refused to allow him the two per cent on all the sales, and directed him to compute the commissions at the rate that he did, and that he took what he could get and what the defendant told him to compute the compensation at. The plaintiff,

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however, remained in the defendant's employ until discharged, for what reason does not appear. The referee found the agreement to have been made as claimed by the plaintiff, and directed a judgment in his favor. The proof that the plaintiff figured commissions upon the basis claimed by the defendant, and received his compensation from time to time upon that basis, was competent as bearing upon the terms of the contract of employment, but it could not be used when, in the case to establish a settlement, an accord and satisfaction or payment in full for the reason that these were affirmative defenses, and they were not pleaded. The referee's finding is supported by evidence, and while we think the preponderance of proof was in favor of the defendant, still we have no power to disturb the judgment. The referee had the parties before him, and had a better opportunity than any appellate court can have to form a correct judgment as to the relative weight and credibility to be given to the conflicting statements of the parties.

The referee allowed the plaintiff commissions on goods ordered before but not delivered until after his discharge. There was no error in this ruling. The services were rendered when the plaintiff solicited and obtained the orders for the sale of the goods, though the commissions might not be due or payable until the goods were actually delivered, but it was not necessary that the delivery should be made during the plaintiff's employment. The discharge of the plaintiff could not affect his right to compensation for services rendered up to that time. The other exceptions to the rulings at the trial did not raise any question of sufficient importance to justify a reversal of the judgment. The learned counsel for the defendant complains that the General Term has improperly refused to review the facts. If we were permitted to look into the opinion and act upon it we would be compelled to say that this complaint is well founded. It appears from the opinion that the General Term refused to review the facts upon the ground that the record did not contain any certificate or statement that it contained all the evidence, although

it did contain a statement that it contained all the testimony. There is undoubtedly a distinction between the terms evidence and testimony. The former is the more comprehensive term and includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. The latter, in common acceptation at least, embraces only the statements of witnesses upon oath, and does not include proof by writings or from other sources. But a statement, as in this case, that the record contains all the testimony, was a substantial compliance with the rule under all the circumstances. When the defendant made and served the case this statement was inserted, doubtless, in order to comply with the rule. The plaintiff could have proposed an amendment if he thought it insufficient. But no amendment was asked and no motion to correct the case made at or before the argument, and no question then raised as to the power of the court to pass upon the facts as well as the law. Under these circumstances the court had the power to pass upon the facts, and it is not often that a case is presented where the right to review the findings of the referee is of more importance to the party making the appeal than in this case. The disputed fact was of such a character, and the evidence upon which the findings of the referee were based was so conflicting at a single point, that the right of the defendant to have it passed upon by the appellate court was important and substantial. But we think that this court has no power to reverse the judgment for the refusal of the court below to review the facts for the plain reason that we cannot say from the record that it has so refused.

The order is a general affirmance of the judgment without specifying the grounds or in any way limiting its legal effect. This is the evidence of the judgment rendered by the court, and its legal import is that every question in the case, whether of law or fact, has been decided. The court below, upon the defendant's theory, refused to review the facts substantially for want of power in that a properly certified record was not before it. We cannot know this, however, from the record,

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but from the opinion, which is no part of the record. In order to raise the point in this court the order itself should show by a proper statement that the court refused to review the facts for want of power or for want of a proper and sufficient record, which amounts to the same thing. (*Snebley v. Conner*, 78 N. Y. 218; *Salmon v. Gedney*, 75 id. 481; *Tilton v. Beecher*, 59 id. 176; *Tolman v. S. B. & N. Y. R. R. Co.*, 92 id. 353.)

In *Porter v. Smith* (107 N. Y. 531) this court reviewed an order of the Supreme Court refusing to pass upon the facts in the case. But in that case the order contained a statement of the grounds upon which the judgment below proceeded, and it was held that the practice adopted by the General Term in that regard was correct. It is now well settled that where the party appealing desires the court to review the facts, he must insert in the record a statement that it contains all the evidence or all that is material to the question sought to be reviewed. But no particular form of words is necessary. A statement that the case contains all the testimony is sufficient in the absence of some objection on the part of the defendant that some material part of it has been omitted. The appealing party can then by motion correct the record by inserting it. Where, however, both sides proceed to argument and submit the case with a statement that it contains all the testimony, without any objection as to the power of the court over the whole case, the court is warranted in assuming that all the evidence is in the case and should pass upon the facts.

The record now before us does not present the question, and the judgment must, therefore, be affirmed.

All concur.

Judgment affirmed

MICHAEL DOYLE et al., Appellants, v. JOHN F. ENGLISH et al.,
Respondents.

The acceptance of a draft by the drawee is no evidence of a loan by him to the drawer. The drawee is presumably a debtor for the amount of the draft and payment of it a discharge of the debt.

In an action to recover an alleged loan the complaint set up part payment by delivery of certain goods and asked judgment for the balance. The answer, after a general denial, alleged a sale and delivery of goods by defendants to plaintiffs, at an agreed price, payments thereon to an amount specified, leaving a balance due, for which judgment was asked. Plaintiff, on the trial, simply produced drafts drawn by defendants upon them and his acceptance and payment thereof. No motion for a non-suit was made and the trial proceeded, the substantial controversy being as to the agreed price for the goods sold, in regard to which the evidence was conflicting, and the only claim of plaintiffs, if any, was for an over-payment. The court was requested by plaintiffs, but refused, to charge that so far as the counterclaim was concerned the burden of proof rested upon defendants. *Held*, no error; that while the charge would have been proper had plaintiffs proved the alleged loan, as they failed in this and were obliged to prove an over-payment on the contract of sale, and to show this were required to prove its terms, upon this issue they, not the defendants, had the affirmative.

(Argued October 15, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 18, 1893, which affirmed a judgment in favor of defendants entered upon a verdict.

This action was brought to recover money loaned to and paid out for defendants by plaintiffs, and also for a machine sold to them.

The facts, so far as material, are stated in the opinion.

Theodore Bacon for appellants. The court erred in refusing to charge as requested, that the burden of proof as to the terms of the contract set up by the defendants was upon them, and in charging that the burden of proof as to that contract was upon the plaintiffs. (*Spencer v. C. M. L. Ins. Assn.*, 142 N. Y. 505; *Murray v. N. Y. L. Ins. Co.*, 85 id. 236;

Conselyea v. Swift, 103 id. 604; *Smith v. Sargent*, 67 Barb. 243; *Conner v. Keese*, 105 N. Y. 643; *Millard v. Thorn*, 56 id. 402; *Johnson v. Plowman*, 49 Barb. 472; *Conklin v. Conklin*, 20 Hun, 278.)

John H. Chadsey for respondents. The court committed no error in refusing to charge as requested by plaintiffs' counsel. (Taylor on Ev. § 338; 1 Greenl. on Ev. 94; *Hennemann v. Heard*, 62 N. Y. 448; *Roberts v. Chittenden*, 88 id. 33.)

FINCH, J. The dispute on this appeal is over the burden of proof, and arises upon a refusal of the court to charge that it rested upon the defendant as far as his pleaded counterclaim was concerned. The argument for the appellant would be formidable and possibly conclusive if the question turned solely upon the form of the pleadings, but when it was raised the facts were all before the court and developed a situation quite different from that sketched in the complaint. The plaintiffs alleged a loan and advance of money to the amount of thirty-one hundred and thirty-five dollars, upon which payments had been made by the delivery of certain goods, wares and merchandise at the agreed price of two thousand and eighty-three dollars and fifty-six cents, and demanded judgment for the balance. The defendants answered by a general denial, and then alleged the sale and delivery of dried apples at an agreed price to the amount of thirty-three hundred and seventy dollars and forty-two cents, upon which had been paid by draft or money thirty-one hundred and forty-three dollars, by four coring machines, eight dollars, and by freight bills, one hundred and seventeen dollars, leaving a balance due the defendants of one hundred and two dollars and twenty-nine cents. The whole substantial controversy was over the agreed price of the dried apples. If that was as the plaintiffs claimed a balance was due them: if as the defendants asserted a balance was due them: and the question arose upon whom rested the burden of proof as to the terms of the contract. If the

plaintiffs could make their case without proving that contract, and it was unessential to their recovery, then the burden was not on them ; and that is what they assert to be the fact. I think they are mistaken. There was no loan or advance of money, but, if anything, an over-payment which could be recovered back. The defendants denied any such loan or advance, and admitted only payments upon the goods sold. The plaintiffs on their part simply produced the drafts they had paid and rested. They had made no case. Proof of the drafts drawn upon them by defendants established no claim against the latter. The acceptors of the drafts were presumably the debtors for their amount, and payment of them was the discharge of a debt and not proof of a demand against the defendants. But no motion for a non-suit was made, and the case tells us only that "thereafter conflicting evidence was given on behalf of the respective parties as to the terms and conditions of the alleged contract." In what order that was done we do not know, but it is quite clear that producing and proving the drafts could not alone make a cause of action, and that the plaintiffs were bound to show as indispensable to their recovery the terms and conditions of the contract as they claimed the truth to be. For they had no cause of action on the drafts. They were obliged to prove that in paying them they had overpaid on the contract, and were entitled to recover back the excess. That excess, as an over-payment beyond what the contract required them to pay, was the sole basis and measure of their cause of action. They would have failed unless they proved that excess, and they could not prove that without proving the contract out of which and because of which the over-payment occurred.

I think, therefore, that proof of the terms of the contract, such as would create the over-payment claimed, was essential to the plaintiffs' case, and so the court was justified in refusing to charge that the defendants had the affirmative.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

**BANK OF NEW YORK NATIONAL BANKING ASSOCIATION, Appel-
lant, v. AMERICAN DOCK AND TRUST COMPANY, Respondent.**

A general power or authority given to an agent to do an act for his principal does not extend to a case where it appears that the agent himself is the person on the other side. Where a power is intended to be given to the agent to act as such in such a case, it must be expressed in language so plain that no other interpretation can rationally be given it.

So, also, the principle that where an agent has been clothed by his principal with power to do an act in case of the existence of some fact peculiarly within the knowledge of the agent, and where the doing of the act is of itself a representation of the existence of the fact, the principal is estopped from denying its existence as against third parties dealing with the agent in good faith, and in reliance upon the representation, does not apply to a case where the agent, assuming to act for his principal, was himself the other party.

Defendant, a corporation authorized by its charter to receive goods for storage and issue warehouse receipts, which were made negotiable, by a by-law directed the warehouse receipts to be signed by its president or secretary. S., its president, applied to plaintiff for and obtained a personal loan, giving therefor his own note and as collateral security a warehouse receipt purporting to be issued by defendant, signed by him as president, acknowledging the receipt on storage for account of himself and subject to his order of a quantity of cotton. Plaintiff's officers knew when the loan was made that the person to whom it was made was defendant's president, and that the loan was a personal one. The loan was made on the faith of the collateral. S., in fact, had deposited no cotton with defendant. The note was not paid at maturity, and defendant, on demand made, refused to deliver the cotton or pay its value. In an action to recover damages, *held*, that the by-law did not clothe the president with authority to issue receipts to himself for cotton which in truth had been deposited by him; and so, that defendant was not estopped from denying the delivery of the cotton, and was not liable.

Bank of Batavia v. N. Y., L. E. & W. R. R. Co. (106 N. Y. 195); *Titus v. Prest., etc.* (61 id. 237); *Goshen Bank v. The State* (141 id. 379), distinguished.

It seems, that if the by-law had given the president general authority to issue receipts to himself for cotton actually deposited, defendant would have been liable to a *bona fide* holder for value of such a receipt, although the president had not in fact deposited any cotton.

Also *held*, that the trial court properly refused to receive evidence of what S. said at the time when he procured the loan.

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The declarations of an agent are only admissible against his principal when the agent is acting at least *prima facie* for his principal and within the scope of his actual or apparent authority.

Reported below, 70 Hun, 152.

(Argued October 12, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 5, 1893, which overruled plaintiff's exceptions and directed judgment in favor of defendant dismissing the complaint.

This action was brought to recover damages alleged to have been sustained by plaintiff through the issuing of a spurious warehouse receipt by defendant.

The facts, so far as material, are stated in the opinion.

John B. Whiting for appellant. It was error to exclude the conversation between Mr. Stone and the officers of the bank at the time the warehouse receipt was delivered to the bank and the money advanced by it. (Whart. on Ev. §§ 259, 1176; Greenl. on Ev. § 113; *M. Bank v. Griswold*, 72 N. Y. 472; *Cowing v. Altman*, 71 id. 435; *Wilson v. M. R. Co.*, 120 id. 145; *H. N. Bank v. A. D. & T. Co.*) It was error to dismiss the complaint at the close of the plaintiff's case. (*Griswold v. Haven*, 25 N. Y. 599; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 id. 30; *Bruff v. Mali*, 36 id. 200; *Bank of Batavia v. E. R. R. Co.*, 106 id. 195; *F. A. Bank v. F. S. S. R. R. Co.*, 137 id. 237; *Titus v. G. W. T. Co.*, 61 id. 237; *Shaw v. P. P. G. M. Co.*, L. R. [13 Q. B.] 103; *Tome v. P. B. R. R. Co.*, 39 Md. 85; *Magee v. Badger*, 34 N. Y. 247; *Belmont v. Hodge*, 35 id. 65; *Chapman v. Rose*, 56 id. 137; *D. C. Ins. Co. v. Hackfield*, 73 id. 226.) The form of action is proper, as a corporation is liable in an action for deceit for the false representations of its officers and agents. (*F. S. Inst. v. N. Bank*, 80 N. Y. 162; *Barwick v. E. J. S. Bank*, L. R. [2 Ex.] 259.)

Thaddeus D. Kenneson for respondent. Defendant's motion to dismiss the complaint was properly granted. (*Bank*

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of Batavia v. N. Y., L. E. & W. R. R. Co., 106 N. Y. 195; *F. & M. Bank v. B. & D. Bank*, 16 id. 125; *Wilson v. M. E. R. Co.*, 120 id. 145; *Pollard v. Vinton*, 105 U. S. 7; *M. L. Ins. Co. v. F. S. S. & G. S. F. Co.*, 139 N. Y. 146; *W. S. L. S. Bank v. S. C. Bank*, 95 U. S. 557; *N. P. Bank v. G. A. M. W. & S. Co.*, 116 N. Y. ; *Voltz v. Blackman*, 64 id. 440; *Fielden v. Lahens*, 2 Abb. Ct. App. Dec. 111; *W. S. L. S. Bank v. Parmalee*, 95 U. S. 557; *Gerard v. McCormick*, 130 N. Y. 261; *Shaw v. M. N. Bank*, 101 U. S. 557; *C. Bank v. McCrea*, 106 Ill. 281; *Carter v. B. L. Ins. Co.*, 110 N. Y. 115.) Any statements or representations made by Stone at the time he procured this loan from the bank to himself individually must be considered as made by him as an individual and for his own individual purpose, and not by him as an officer of the defendant for any purpose pertaining to the business of the defendant. (*M. L. Ins. Co. v. F. S. S. & G. S. F. R. R. Co.*, 139 N. Y. 146; *Farrington v. S. B. R. R. Co.*, 158 Mass. 406.)

PECKHAM, J. The defendant herein was authorized by its charter to receive goods for storage and issue warehouse receipts, which were made negotiable and transferable by indorsement and delivery, and any holder thereof was to be taken to be the owner or pledgee of the goods mentioned in the receipt for any advance or credits on the same, subject, however, to charges for storage. When goods were received it became necessary for some one to sign and deliver the warehouse receipt, and that duty was provided for in a by-law or resolution of the company, which was introduced in evidence. It provided that after the date of the directors' meeting at which it was adopted (Aug. 1, 1890), the warehouse receipts, until otherwise directed, should be signed by either the president or treasurer. At the time of the transaction in question M. W. Stone was president of the company and F. H. Pouch was treasurer. In Nov., 1890, Mr. Stone went to the plaintiff and sought and obtained a personal loan, for which he gave

his own note, and as collateral security for its payment he gave a warehouse receipt purporting to be issued by the defendant, the material portion of which is as follows :

“NEW YORK, Nov. 4, 1890.

“Received on storage at the ‘American Docks’ for account of M. W. Stone one hundred and sixty-two bales of cotton, marked G B, subject to the order of himself, on payment of the charges accrued thereon and surrender of this receipt.

“M. W. STONE,

“*President.*”

Indorsed upon this receipt was the following : “The property mentioned below is hereby released from this receipt for delivery from warehouse. M. W. Stone.”

The officers of the plaintiff with whom the loan was effected knew at the time that the Stone who obtained the loan and the Stone who was president of the defendant were one and the same individual, and they knew that the transaction as to the loan was a personal one with Mr. Stone and that the defendant had nothing to do with it. The plaintiff made the loan upon the faith of the collateral security furnished by the receipt. The note was not paid at its maturity, and when demand was subsequently made by plaintiff upon defendant for the cotton mentioned in the receipt, it appeared that there had never been any cotton deposited with the defendant and that the receipt in that respect stated a falsehood.

The defendant refused to deliver any cotton, and the plaintiff brought this action, claiming to be a *bona fide* holder for value of the receipt, and that the defendant was bound to deliver to it the cotton mentioned therein or else pay its value.

The officers of the plaintiff at the time of the loan had known Mr. Stone for some years, but there had never been any transactions between plaintiff and Mr. Stone as representing the defendant further than that the latter had on some few occasions come to the plaintiff's banking house to mark off cotton which was discharged on certificates held by plaintiff for other parties, but Mr. Stone had never come there to

borrow money for defendant. The plaintiff made no inquiries at the time of the loan as to the extent of the power of Mr. Stone to act for defendant and sign receipts.

The question of the liability of the defendant turns upon the construction given to the by-law or resolution above mentioned. Did it give authority to the president to sign receipts in his own case?

I think that if the president had issued a receipt similar to the one in question, except that it acknowledged the receipt of cotton from some third person, although such named person had not in fact deposited any cotton, yet in such case the defendant would have been liable because the president had general authority under the by-law to issue receipts for cotton deposited by third parties, and, therefore, when he issued a receipt where no cotton had been received, although it was a violation of his authority and of his duty, yet the defendant would be held responsible on account of such general authority to give receipts. This is upon the principle decided in *Bank of Batavia v. Railroad Co.* (106 N. Y. 195) and cases cited. That principle is that where an agent has been clothed by his principal with power to do an act, in case of the existence of some fact peculiarly within the knowledge of the agent, and where the doing of the act is in itself a representation of the existence of that fact, the principal is estopped from denying its existence as against third parties, dealing with the agent in good faith and in reliance upon the representation.

I also think that if the by-law clothed Mr. Stone, the president, with general authority to issue receipts to himself for cotton which he actually deposited, if with such authority he issued a receipt where he had not in fact deposited any cotton, the defendant would be liable to respond to a *bona fide* holder for value of such receipt. These two propositions I do not understand the defendant to dispute, or at least he does not regard them as antagonistic to his argument.

We come, then, to the consideration of the proper construction of the by-law. In the light of the general rules of

law upon the subject of principal and agent, we are of the opinion that the by-law or resolution in question ought not to be construed as clothing either the president or the treasurer with any authority to issue receipts to himself for cotton which in truth had been deposited by him. It is an acknowledged principle of the law of agency that a general power or authority given to the agent to do an act in behalf of the principal, does not extend to a case where it appears that the agent himself is the person interested on the other side.

If such a power is intended to be given it must be expressed in language so plain that no other interpretation can rationally be given it, for it is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time. (*Clafin v. Bank, etc.*, 25 N. Y. 293; *Pratt v. Fire Ins. Co.*, 130 id. 206-216; *Neuendorf v. World Ins. Co.*, 69 id. 389; *Manhattan Co. v. Railroad Co.*, 139 id. 146.) The by-law is general in its terms and could be fully carried out to its fair and legitimate purpose by excluding from its meaning the case of either officer acting in his own personal matter. The case of *Titus v. Turnpike Co.* (61 N. Y. 237) is unlike this case. The learned chief commissioner points out in his opinion what the difference is between an agent acting in matters for a principal in which he is himself the other party, and the mere act of an officer signing the scrip issued by a corporation where he is himself the owner of such scrip. The by-law in that case provided that the scrip should be signed by both the president and the treasurer, and the president was by the charter necessarily a stockholder. The case was one in which such an officer either had to go without any evidence of his ownership of stock except what the books might show, or else he was to be permitted to sign the scrip. Upon the special facts in that case, the decision held that the president and the treasurer had the right to sign the scrip owned by and issued to themselves.

Nor is the case of *The Goshen Bank v. The State* (141 N. Y. 379) an authority in point here. In that case it appeared that the cashier had power to draw drafts for his own use or

payable to his own order upon the same terms that he had to draw a draft for a stranger, viz., upon payment to the bank of the amount of the draft.

When the cashier issued such a draft, he was acting within the scope of his apparent authority, and the very act of issuing the draft was a representation of the existence of the fact that the draft was paid for. And we also held, for the reasons therein stated, that there was a difference in the case of bank or cashier's drafts from most other cases of agency.

The difference between this case and those which have been cited by the plaintiff is that in the cited cases the terms of the authority given to the agent were such that the agent had power, upon the existence of a certain fact, to do the very act which was in question, whereas in this case we hold that by the true construction of the terms of the authority given to the president, he had no power in any case to sign a receipt such as is now before us.

We are, therefore, of the opinion that upon the evidence, as presented to the trial court, the plaintiff made out no cause of action.

It is, however, claimed upon the part of the plaintiff that there was error in the ruling of the trial judge in refusing to receive evidence of what Mr. Stone said at the time when he procured the loan, and that if he had received the evidence the plaintiff might then have made out a case. We think the judge was right in his decision. The transaction with plaintiff was indisputably a personal one on the part of Mr. Stone. This fact was known by the officers of the plaintiff, and is also not disputed. The declarations of one who is in some matters an agent for another, can only be admissible against his principal when such agent is acting in the affairs of his principal, and within the scope of his actual or apparent authority. This was no such case. There was no actual or apparent authority conferred upon Stone to receipt for the defendant in any case in which it appeared that he was the person who deposited the cotton; and when he was engaged in a private and personal transaction with the plaintiff, known to be such

by the plaintiff, he could make no declarations which would bind the defendant. (*Manhattan Life Co. v. Railroad Co.*, 139 N. Y. *supra*, and cases cited; *Moore v. Bank*, 111 U. S. 156 at 164.) The acts of Stone while in the bank, such as making the note, assigning the insurance policies and delivering the receipt in question, were admitted in evidence in the course of the attempt of plaintiff to make out a cause of action, and, as all the facts cannot be proved at once, it was proper to admit these facts, which, taken with others afterwards to be shown, might make out a case against the defendant. But the claim of a right on the part of the plaintiff to prove declarations of Stone, made while he was not in the performance of any duty pertaining to his agency, and while on the contrary he was confessedly engaged in an outside and personal transaction, cannot be assented to. The cases which assert the doctrine that when the acts of the agent are admissible for the purpose of attempting to bind the principal, then his declarations made at the same time are admissible, are cases where the agent is *prima facie* at least acting at the time in the business of the principal. I have found no case where evidence such as was here offered has under similar circumstances been received. There was nothing to explain or to submit to the jury as to the character in which Stone acted or made declarations at this time. The plaintiff admits by its officers, who are witnesses, that it knew this was a personal transaction and consequently there was absolutely no basis upon which to found a claim that in this transaction any declaration made by Stone could be imputed to the defendant as a declaration of its agent. The proposed evidence did not point towards the possible proof of any facts as distinguished from declarations upon which to maintain an estoppel *in pais* against the defendant, and if such facts were to be proved, some idea of that design should be given to the court, for upon its face the evidence was not admissible.

It is in proof that the plaintiff's agents made no inquiries as to the right of Stone to sign the receipt, and it might perhaps be somewhat difficult to erect an estoppel *in pais* upon

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Statement of case.

facts which plaintiff might have found out upon inquiry, but which in truth it was ignorant of at the time of the transaction.

We think the court did not err in rejecting the evidence. There is no basis upon which a recovery in this action could be sustained, and the judgments of the courts below must, therefore, be affirmed, with costs.

All concur.

Judgments affirmed.

THE IMPORTERS AND TRADERS' NATIONAL BANK OF NEW YORK, Respondent, v. CEBRA QUACKENBUSH, Impleaded, etc., Appellant.

SAME, Respondent, v. SAME, Appellant.

Under the provisions of the Code of Civil Procedure (§ 2435) authorizing a judgment creditor to institute proceedings supplementary to execution "at any time within ten years after the return wholly or partly unsatisfied of an execution against property," an execution which is effective to exhaust the remedy at law is intended; and so, it is not enough that forms are observed by the return of an execution which is not effective to reach all of the debtor's property, and the right does not arise unless at the time of issuing the execution the creditor had a judgment which was a lien on the debtor's real estate and chattels real, so that the execution could reach them as well as his personal property.

Where, therefore, a judgment was recovered in January, 1879, and execution was issued thereon in March, 1894, and upon return thereof unsatisfied an order was issued requiring defendant to appear and answer in supplementary proceedings, *held*, that a motion to vacate the order was improperly denied; that as under said Code (§ 1251) the lien of the judgment upon defendant's real estate and chattels real ceased after ten years, the execution was not effective to reach all the debtor's property so as to exhaust the legal remedy, and, as no steps had been taken to re-establish the lien, the proceedings were improperly instituted.

A prior execution had been issued upon the judgment immediately after its rendition, which was returned unsatisfied. *Held*, that the right to maintain supplementary proceedings then accrued and became barred after the lapse of ten years, in the absence of some new proceedings to revive it, to which the debtor was a party.

(Argued October 22, 1894; decided November 27, 1894.)

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APPEALS from orders of the General Term of the Supreme Court in the third judicial department, made July 14, 1894, which affirmed an order of Special Term in each of the above-entitled actions vacating a stay of proceedings and denying a motion by this appellant to set aside an execution issued therein and orders for his examination in supplementary proceedings.

The facts, so far as material, are stated in the opinion.

Abraham Lansing for appellant. At the time of the granting of the orders in question more than fifteen years had elapsed since the filing of the judgment rolls; and, as more than five years before the orders were granted, the judgments had ceased to be liens upon real estate and chattels real; and, as none of the steps available to the plaintiff had been taken to re-establish the liens of the judgments upon that class of the debtor's property, the orders were unauthorized and should be set aside. (*Lynch v. Johnson*, 48 N. Y. 27, 33; *Barnes v. Morgan*, 3 Hun, 703, 705; *Storm v. Waddell*, 2 Sandf. Ch. 494; 3 Rumsey Pr. 308; *Crippen v. Hudson*, 13 N. Y. 161; *Dunlevy v. Talmadge*, 32 id. 460; *Field v. Hunt*, 22 How. Pr. 332, 333; *Millard v. Shaw*, 4 id. 138; *Child v. Brace*, 4 Paige, 309, 310, 311, 315; *Geery v. Geery*, 63 N. Y. 256; *Adsit v. Butler*, 87 id. 588; *O. Bank v. Olcott*, 46 id. 12; *Kitchen v. Lowery*, 127 id. 53, 60; *Burton v. Rathbone*, 126 id. 187; *Spelman v. Freedman*, 130 id. 425; *Wing v. De La Rionda*, 125 id. 680; *Carpenter v. Stillwell*, 11 id. 61; *Adee v. Bigler*, 81 id. 349; *G. Bank v. Mead*, 92 id. 637; *Story's Eq. Juris.* §§ 1480, 1481; *Sollory v. Leaver*, L. R. [9 Eq. Cas.] 22; *Cory v. Long*, 12 Abb. Pr. [N. S.] 434; *O. Asylum v. McCartee*, Hopk. Ch. 435; *People v. U. Ins. Co.*, 15 Johns. 358, 380; *Jackson v. Collins*, 3 Cow. 89, 96; *L. S., etc., R. R. Co. v. Roach*, 80 N. Y. 344; *Smith v. People*, 47 id. 330; *Tracy v. T., etc., R. R. Co.*, 38 id. 433, 437; *Holmes v. Carley*, 31 id. 289, 290; *People v. N. Y.*, 95 id. 554, 558, 559; *People v. Lacombe*, 99 id. 43, 49; *Spears v. Mayor, etc.*, 72 id. 442, 444;

Anonymous, 32 Barb. 201, 202; *Davidson v. Horn*, 47 Hun, 51, 53; *Bucklin v. Ford*, 5 Barb. 393, 394, 395; *McQueen v. Babcock*, 3 Abb. Ap. C. 129; *Demarest v. Wynkoop*, 3 Johns. Ch. 130, 146; *Bank of Kinderhook v. Gifford*, 4 Barb. 659; *Green v. Johnson*, 3 Gill & Johns. 394; *Fisher v. Harden*, 1 Paine C. C. 55, 61; *Bell v. Morrison*, 1 Pet. 356, 360; Angell on Lim. 9, 23, 194, 479.)

Robert W. Townsend for respondent. The execution to Rensselaer county, issued in January, 1879, was sufficient. (Code Civ. Pro. §§ 2425, 2458; *Wade v. De Leyer*, 8 J. & S. 541; 63 N. Y. 318.) Leave to issue would certainly have been granted on the facts as they appear, there being no pretense that the judgment is paid in whole or in part. (*Kincaid v. Richardson*, 9 Abb. [N. C.] 315; 25 Hun, 237; *Nichol v. Kilsey*, 13 Civ. Pro. Rep. 154.) In such a case it is within the court's discretion to refuse to set aside the execution. (*Frean v. Garrett*, 24 Hun, 161; *Bank of Genesee v. Spencer*, 18 N. Y. 150.) The right to institute supplementary proceedings has not expired by the ten years' limitation. (*Levy v. Kirby*, 19 J. & S. 69; *M., etc., Co. v. Hudson*, 1 How. Pr. [N. S.] 517.)

O'BRIEN, J. The plaintiff, on the 27th of March, 1894, obtained from a justice of the Supreme Court two orders requiring the defendant to appear before a referee named and be examined in proceedings supplementary to execution as to his property. The proceedings were based upon two judgments recovered by the plaintiff against the defendant and others on the 22d day of January, 1879, the judgment roll in each case having been filed on that day. Execution was issued upon these judgments immediately thereafter and returned unsatisfied. In March, 1894, new executions were issued upon these judgments and returned unsatisfied as a step preliminary to these proceedings. The defendant moved at Special Term to vacate the orders, but the motion was denied and these orders have been affirmed on appeal. About

the time of docketing these judgments other creditors also obtained judgments, upon some of which proceedings of this character were instituted and examinations had, but no property was discovered.

This appeal presents the question whether a judgment creditor is entitled to maintain proceedings supplementary to execution fifteen years after the docketing of his judgments, and after they had ceased to be a lien upon real estate and chattels real. It may be safely asserted that every remedy which a creditor has by law for the enforcement of the debt becomes barred by the lapse of some definite period of time, and when barred it cannot be revived at his mere will and pleasure without some new proceeding for that purpose of which the debtor has notice. The judgment itself is barred after the lapse of twenty years, and it is reasonable to suppose that at some time within that period the debtor is relieved by the lapse of time from proceedings of this character. There ought to be some limitation, and one of the questions here is what that limitation is. By section 2435 of the Code of Civil Procedure the creditor is entitled to institute these proceedings by obtaining an order for the examination of the debtor at any time within ten years after the return of an execution unsatisfied; therefore, the rights of the plaintiff to maintain these proceedings upon the judgments accrued to him as early as the year 1879; and the ten years expired in 1889. The decisions of the courts below are to the effect, however, that the plaintiff can revive the right at its own pleasure and extend the period indefinitely by simply issuing new executions from time to time, and thus setting the ten years running from the date of the return of the last execution. This conclusion is deduced from a literal reading of the statute which authorizes the order at any time after the return of an execution unsatisfied, and if followed to its logical result would permit the plaintiff to institute the proceedings after twenty years when the judgment itself had become barred. We think that when the statute gave the creditor ten years from the date of the return of an execution to obtain

the order that this period was intended as a limitation. The right accrued after the return of the first execution and became barred after the lapse of ten years in the absence of some new proceeding to revive it to which the debtor is a party by notice or otherwise. It seems to me that this proposition is sustained by authority. (*Conyngham v. Duffy*, 125 N. Y. 200; *Baumler v. Ackerman*, 63 Hun, 40.) It is unnecessary to determine the meaning or application of section 1252 of the Code with respect to proceedings of this character, as it is obvious that the plaintiff did not comply with it or proceed under it. The plaintiff may, however, revive his right by a suit upon the judgment, which he may prosecute with the permission of the court, and having obtained a new judgment he is in the same position that he was before the ten years began to run. (Code, § 1913, sub. 2.) But the plaintiff was not entitled to this remedy for another reason, and that is that, under the circumstances of the case, it did not and could not comply with conditions which courts of equity have always held to be indispensable in order to maintain these proceedings. Proceedings supplementary to execution are remedies in equity for the collection of the creditor's judgment, and were intended as a substitute for the creditor's bill, as formerly used in chancery. (*Lynch v. Johnson*, 48 N. Y. 27; *Barnes v. Morgan*, 3 Hun, 703; *Storm v. Waddell*, 2 Sand. Ch. 494.) In such cases it was the settled rule that unless the creditor had exhausted all his remedies at law, or in case he was not in a position to avail himself of all the ordinary remedies which courts of law gave for the enforcement of judgments, the bill in equity could not be maintained and would be dismissed. The creditor must pursue his remedy at law to every available extent before he can resort to equity for relief. (*Dix v. Briggs*, 9 Paige, 595; *Crippen v. Hudson*, 13 N. Y. 161; *Dunlery v. Tallmadge*, 32 id. 460; *Child v. Brace*, 4 Paige, 309; *Geery v. Geery*, 63 N. Y. 256; *Adsit v. Bulter*, 87 id. 588; *Ocean Bank v. Olcott*, 46 id. 12.)

The same rule applies to proceedings supplementary to

execution, and it is not enough that forms are observed by the return of an execution which is not effective to reach all of the debtor's property. (*Austin v. Figueira*, 7 Paige, 58.) Accordingly it has been held that the proceedings cannot be had upon a foreign judgment, a judgment rendered by a court of the United States or upon judgments *in rem* where personal service was not made since they do not bind all the debtor's property. (*Rocky Mountain National Bank v. Bliss*, 89 N. Y. 338; *Thomas v. Merchants' Bank*, 9 Paige, 216.) If the creditor's judgment, by reason of the lapse of time, has ceased to be a lien upon the realty of the debtor, his remedy at law cannot be exhausted, and, therefore, he must, by some proper proceeding, reinstate the lien, otherwise the issue and return of an execution would become an idle and unmeaning ceremony. (*Carpenter v. Stilwell*, 11 N. Y. 61-71.)

Under section 1251 of the Code the lien of the plaintiff's judgments upon the real estate and chattels real of the defendant ceased after ten years, and, hence, when the last executions were issued in 1894 they were not and could not be effective to reach all the debtor's property or to exhaust the legal remedy. The return on these executions is no evidence that the defendant did not have at that time abundant real estate, subject to sale upon execution, with which to satisfy the judgments.

The court is authorized in these proceedings by section 2468 of the Code to appoint a receiver of all the debtor's property, and it is provided that when the receiver qualifies he shall become vested with the title to the debtor's real property upon filing the order appointing him or a certified copy thereof in the county where the real estate is situated. But this provision cannot refer to real estate which is not bound by the lien of any judgment, or against which no execution has been issued upon which it could be sold. As to real estate so situated, the creditor does not need a receiver or any other equitable relief. A court of equity will never appoint a receiver for the purpose of doing for the creditor what he may do for himself. (*Sollory v. Leaver*, L. R. [9 Eq. C.] 22; *Corey v.*

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Long, 12 Abb. Pr. [N. S.] 434; *Orphan Asylum v. McCartee*, Hop. Ch. 435.)

When the various provisions of the Code authorizing these proceedings are examined and considered as a general scheme to take the place of the former bill in chancery, the conclusion is reasonable that they are all based upon the assumption that at the time of issuing the execution the creditor had a judgment which was a lien on the debtor's real estate and chattels real which would make the return effective to exhaust all remedies at law. They were not framed to meet a case like this, where at best the execution could reach only personal property. While the statute in terms permits the creditor to apply for the order within ten years from the return of an execution upon the judgment unsatisfied, yet it must mean, according to every fair analogy, an execution which is effective to exhaust the remedy at law, and, therefore, must refer to a judgment which is a lien upon real estate.

If this view is correct it follows that the orders appealed from should be reversed, and the orders requiring the defendant to appear for examination before the referee should be vacated, with one bill of costs to the defendant in all courts.

All concur, except PECKHAM, J., not sitting.

Ordered accordingly.

TERESA C. GRAHAM, Respondent, v. JOHN GRAHAM,
Appellant.

Where an agreement is made between parties standing in a confidential relation, or in a relation which gives to one party great influence over the other, and the agreement is to the advantage of the party in whom the confidence is reposed or whose influence is the dominant one, and to the detriment of the other party, the former will not be permitted to enforce the agreement unless it appears that he acted in the utmost good faith and that disclosure was made of all the material facts, or that the other party acted with a clear comprehension of the object and effect of the agreement.

This rule applies in favor of a wife in respect to an ante-nuptial contract, and the courts will regard with rigid scrutiny such a contract

where it deprives her of any prospective interest in the estate of her intended husband, and especially where no provision is made therein for her support in case she survives him.

In an action by the wife to set aside an ante-nuptial agreement, by the terms of which she surrendered all claim to dower, it appeared undisputably that defendant at the time the agreement was made owned real estate of the value of \$100,000; that the relinquishment of dower was not a condition of the engagement of marriage; that there was no negotiation between the parties on that subject before they met and executed the agreement; that defendant then stated that he wanted it arranged so that he could buy and sell real estate without interference from her, but did not disclose to her that this would mean a relinquishment of her dower right; that no consideration was paid for the surrender, and that she acted without the aid of counsel. *Held*, that the General Term properly reversed on the facts a judgment of Special Term in favor of defendant; and that plaintiff was entitled to the relief sought.

Reported below, 67 Hun, 829.

(Argued October 15, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 24, 1893, which reversed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff against defendant, her husband, to have an ante-nuptial agreement canceled and declared void.

The facts, so far as material, are stated in the opinion.

James A. Deering for appellant. The ante-nuptial agreement executed between the parties to this action is a valid legal instrument and binds the parties thereto by its terms. (Story's Eq. Juris, §§ 1297, 1370; *Simpson v. Gutteridge*, 1 Madd. 609; *Naill v. Nann*, 25 Md. 532; *Jacobs v. Jacobs*, 42 Iowa, 600; *Barth v. Lines*, 118 Ill. 374; *Wentworth v. Wentworth*, 69 Mo. 17; *Findley v. Findley*, 11 Gratt. 434; *Peck v. Peck*, 12 R. I. 485; *Miller v. Goodwin*, 8 Gray, 542; *Jenkins v. Holt*, 109 Mass. 261; *Weaver v. Weaver*, 109 Ill. 225; *Andrews v. Andrews*,

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8 Conn. 79; *Withers v. Weaver*, 10 Barr, 391; *Pierce v. Pierce*, 71 N. Y. 154; *Peevit v. Wilson*, 103 U. S. 22; *Herring v. Wickham*, 29 Gratt. 628; 4 Kent's Com. [5th ed.] 463, 494; *Sterry v. Arden*, 1 Johns. Ch. 261; *Huston v. Cantril*, 11 Leigh, 136; *Tunns v. Trezevant*, 2 Desaus, 264; *Whelan v. Whelan*, 3 Cow. 79, 538; *Maguire v. Thompson*, 7 Pet. 348; *Andrews v. Jones*, 10 Ala. 400; 14 Am. & Eng. Ency. of Law, 544; *Michael v. Morey*, 26 Md. 239; *Riley v. Riley*, 25 Conn. 154; *Brown v. Jones*, 1 Atk. 188; *Stileman v. Ashdown*, 2 id. 498; *Wheeler v. Caryl*, Amb. 121; *Marshall v. Morris*, 11 Ga. 368; *Armfield v. Armfield*, 1 Freem. [Miss.] 311; *Roberts v. Roberts*, 22 Wend. 140; *Rivers v. Thayer*, 7 Rich. [So. Car.] Eq. 136; *Neves v. Scott*, 9 How. [U. S.] 196.) The court below erroneously reversed the action of the Special Term on the question of fact in the case. (*Swazey v. Berger*, 125 N. Y. 677; *Kemp v. Peck*, 35 N. Y. S. R. 780; *Van Der Zee v. Herman*, 35 id. 778; *Crim v. Starkweather*, 36 id. 314; *Phillips v. Meily*, 106 Penn. St. 536; *Thomas v. Loose*, 114 id. 35; *Kessler's Estate*, 143 id. 386; *Smith v. Brush*, 1 Johns. Ch. 459; *Walton v. Hobbs*, 2 Atk. 19; *Sullivan v. Bates*, 1 Litt. 41; *Flagg v. Mann*, 2 Sumn. 486, 550.)

George Bliss for respondent. The paper is absolutely without validity. Under the statute, to make a release of dower by an intended wife of any force, there must be a pecuniary provision for her benefit in lieu of dower. (1 R. S. 741, §§ 9, 10, 11, 12, 13, 14; *Ennis v. Ennis*, 48 Hun, 11; *McCartie v. Teller*, 2 Paige, 571; *Hawley v. James*, 5 id. 318; *Jones v. Fleming*, 104 N. Y. 418.) The decision of the trial justice was wrong, and was properly reversed at General Term because it is clear that, whether the paper was read to her or not, Mrs. Graham did not understand the meaning of the paper she signed, while to make such a paper valid it is peculiarly necessary that it should be proved beyond all question that it was executed with full understanding of its effect. And where the provision is disproportionate and inadequate

the burthen is on the husband to show good faith. (*Pierce v. Pierce*, 71 N. Y. 154.)

ANDREWS, Ch. J. The order of the General Term from which the appeal is taken reversed, both on the facts and law, the judgment in favor of the defendant, entered upon the decision of the Special Term. The trial judge found that the ante-nuptial agreement was executed by the plaintiff voluntarily and understandingly, and was valid and binding both in law and equity. The judgment followed the decision and dismissed the complaint on the merits. The General Term held that the agreement by which the plaintiff, without any consideration except that arising out of the contemplated marriage between the parties, consented to release and discharge all claim to dower in the estate of the defendant in case she survived him, and that she would make no claim to any share in his personal estate, unless under his will or some act done by him subsequent to the execution of the agreement, was void. This conclusion was placed upon the ground that an agreement by which a woman in contemplation of marriage surrendered any future right to dower in the estate of her intended husband which might accrue to her on the marriage, required for its support a pecuniary provision, in property or money, under the statutes relating to jointures (1 Rev. St. 741, §§ 10, 11, 12, 13), and that marriage alone was not a sufficient consideration. The General Term further decided that, conceding the validity of an ante-nuptial agreement for the release of dower, based on the consideration of marriage, and in the absence of any pecuniary provision, the judgment should, nevertheless, be reversed and the case be remitted for a new trial, for the reason that the evidence did not satisfy the appellate court upon the point that the agreement in question was executed by the plaintiff with an understanding of its effect, and that the law which casts upon a husband claiming under such an agreement the burden of showing that the intended wife was advised of and understood the nature and effect of the agreement when

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she executed it, had not been satisfactorily discharged. If the General Term was justified in reversing the judgment, under the rules which govern the exercise of its appellate jurisdiction, to reverse the judgment and grant a new trial upon the facts, then the order of the General Term must be affirmed, irrespective of what our view might be upon the question of law determined by that court, because on the other branch of the case the order of reversal must be upheld. By the terms of the agreement of July 3, 1890, the plaintiff, between whom and the defendant a contract of marriage had existed from sometime in June, surrendered without any pecuniary consideration whatever the valuable interest which, on the marriage, she would acquire as wife in the real estate of her intended husband. That this was to her an important transaction is shown by the conceded fact that the defendant was the possessor of real estate of the value of \$100,000, and that the value of the plaintiff's inchoate right of dower therein on her marriage (two days after the agreement was made) would have been, except for her release, at least \$8,900. The subject of dower had never been broached between the parties prior to the very occasion when she was called upon to execute the agreement, nor is it claimed that the subject of a marriage settlement was ever suggested by either. The first suggestion of the propriety of any ante-nuptial agreement came from the defendant on the Sunday evening preceding the Thursday when the agreement in question was executed. The defendant states the conversation between himself and the plaintiff as follows: "I told her I would like to have my real estate matters fixed up, so I would have nobody interfering, so that I could use it freely whenever I would like, sell it or buy real estate, and nobody to interfere." She said, "All right." The plaintiff, referring to this conversation, testified: "He said, 'If we are going to be married I think it necessary that you should see a lawyer.' I said, 'Well, I don't think so.' He said, 'Business is business.' I said, 'My marriage is not business. I have nothing to see a lawyer about.' He said, 'Well, you come and see mine,' and I said, 'Certainly I will.' He

did not tell me why he wanted me to go and see a lawyer; he did not say anything about signing any papers."

Both parties were fully examined on the trial. The defendant did not deny any part of the plaintiff's testimony on the subject of the conversation on Sunday evening. It is uncontradicted that the subject of dower was never in terms referred to between the parties before the agreement was executed and there was no negotiation between them on the subject. The defendant, according to his testimony, did inform the plaintiff that the purpose of consulting a lawyer was to have it arranged so that he could buy and sell real estate "and nobody to interfere." This might have led a person acquainted with legal matters to understand that it related to an arrangement about dower, but at best the reference was vague and would not be likely to be understood by the plaintiff. The evidence is uncontradicted that after this conversation and without any further conversation or consultation with the plaintiff, the defendant instructed his attorney to draw up an ante-nuptial agreement between the parties, whereby, in consideration of the sum of \$5,000, to be paid the plaintiff by the defendant, she consented to discharge all claim of dower in his estate and to any share of his personal property, unless given her by his will or other act of the defendant. Neither the sum of \$5,000 nor any other sum had been mentioned between the parties, nor had the subject of a pecuniary provision for the wife been suggested between them. On the day fixed by the defendant the parties met at the office of the defendant's attorney. There is some conflict of testimony as to what occurred on that occasion. It is conceded that when the sum of \$5,000 was mentioned as intended to be given to the plaintiff, she refused to receive it, saying, "I can't have any money mixed up with my marriage." The parties then left the office of the attorney to return when a new paper should be prepared. They returned to the office after an hour or more and then another instrument similar to the first one, except in the expression of the consideration, was executed, which is the agreement in question. The plaintiff testifies

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that the subject of dower was not mentioned in the conversation on that occasion, and that the paper was hurriedly read over to her and executed, and that she did not understand that she was releasing her dower or any right in the estate of the defendant. She said: "My understanding of the nature of the papers which I signed was to give Mr. Graham full control of his business;" and again: "I understood I was giving my husband full control of his property free from any interference with me." She also testified that she did not understand the legal meaning of dower. The defendant in his testimony did not claim that anything was said on the subject of dower when the agreement was executed. The attorney for the defendant was a witness in his behalf, and in his testimony occurs the only contradiction to the testimony of the plaintiff on this subject. He testified that when reading the first instrument when he came to the \$5,000 clause she said, "Oh, no. I don't want any money," and when he finished reading she said, "The paper is all right with the exception of the \$5,000. I will not take any of Mr. Graham's money; I am not marrying him for money." Mr. Graham said, "Well, I won't carry out the ceremony unless you release your dower in my property." She said, "I am willing to, but I don't want to take any money." There seems to be no appropriate relation between this declaration of Mr. Graham, to which the attorney testified, and the conversation which preceded it, in which the plaintiff is represented as acquiescing in the proposed arrangement with the exception stated. We have referred in some detail to the main evidence bearing upon the question whether the plaintiff executed the ante-nuptial agreement understandingly. It is an important general rule which does not permit a formal written agreement to be set aside or disregarded without strong evidence of fraud or mistake. But where an agreement is made between parties standing in a confidential relation, or in a relation which gives to one party great influence over the other, and the agreement is to the advantage of the party in whom the confidence is reposed, or whose influence is the

dominant one, and to the detriment of the other party, the former will not be permitted to enforce the agreement unless it appears that his conduct was characterized with the utmost good faith, and that disclosure was made of all the material facts, or that the other party acted with a clear comprehension of the object and effect of the agreement made. This rule has been applied in favor of the wife in respect to ante-nuptial contracts. The relations between the intended wife and her future husband are regarded as confidential and naturally give to the man great influence over the woman with whom he has entered into an engagement of marriage. The courts regard with rigid scrutiny an ante-nuptial contract which deprives her of any prospective interest in the estate of her intended husband, and especially is this required in a case where such relinquishment on her part is made without any provision for her support in case she survives him. (*Pierce v. Pierce*, 71 N. Y. 154; *Kline v. Kline*, 57 Pa. St. 120; *S. C.*, 64 id. 122.)

It cannot be said that in this case there is no evidence that the plaintiff understood the transaction. But to summarize what has been said these facts are substantially undisputed (1) the relinquishment of dower was not a condition of the engagement of marriage; (2) there was no negotiation between the parties on the subject before they met and executed the agreement; (3) the defendant, in the conversation between himself and the plaintiff, did not disclose to her that an arrangement to give him the right to control his business and buy and sell real estate without interference would mean a relinquishment of her dower right; (4) she received no pecuniary equivalent for the surrender of her right. The evidence of the attorney for the defendant and of his clerk, who took the acknowledgment of the instrument, warrant an inference that she understood its purpose. But she expressly denies their testimony in material points; and even if dower was spoken of on the occasion of the execution of the instrument she may not have understood its legal significance, and she testifies that she did not understand it. She acted without the aid of counsel, and con-

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cededly not in pursuance of any prior understanding with her husband, of which this specific agreement was the outcome.

We think the General Term was justified in reversing the judgment on the facts. The order should, therefore, be affirmed and judgment absolute entered in pursuance of the stipulation.

All concur.

Ordered accordingly.

ADOLPH ROTHMILLER, Respondent, v. THEODORE G. STEIN,
Appellant.

Plaintiff's complaint alleged in substance that he owned stock of a corporation; that another stockholder offered to purchase his stock, making two offers, one \$80 per share, the other \$50 cash per share, with the right to another \$50 in January, 1894, in case the company should in the meanwhile have paid dividends of ten per cent for 1893. Plaintiff advised defendants, who were directors of the corporation, of these offers, and asked them as to the condition of the company that he might determine which one to accept; that they, knowing the facts, for the purpose of deceiving plaintiff and making him believe that the business of the company was flourishing, made statements set forth in regard to its condition, the amount of stock paid in, etc., which they knew to be false, and advised him not to sell his stock at less than par; that relying on these statements he accepted the offer last mentioned; that the company was at the time insolvent and declared no dividends for 1893, and so plaintiff received but the \$50. Upon demurrer to the complaint, *held*, that it set forth facts sufficient to establish a legal fraud and damages resulting therefrom, to recover which an action was maintainable.

Defendants claimed that as the complaint alleged the company was insolvent at the time of the sale of the stock, if they had told plaintiff the truth he would himself have been guilty of fraud in making a sale without communicating this fact to the purchaser, and if he had disclosed it a sale would not have been made. *Held*, untenable; that if defendants had informed plaintiff that the company was insolvent he would have been under no legal obligation to volunteer the information to another stockholder offering to purchase his stock.

The maxim of *caveat emptor* as a general rule applies to sales of goods, and unless there is some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, the vendee is bound by the sale, notwithstanding the existence of extrinsic defects, materially affecting its value, known to the vendor and unknown to the vendee.

The exception to this general rule stated and the authorities upon the subject collated.

It seems, that while the law courts will not permit the recovery of damages against a vendor in a case coming under the general rule, because of mere concealment of a fact, yet, if the vendee refused to complete the contract because of the concealment of a material fact, equity will refuse to compel him to do so, as it only compels specific performance of a contract which is fair and open and in regard to which all material facts known to each have been communicated to the other.

In regard to a business corporation engaged in carrying on its business, the mere fact that it is temporarily insolvent is not of that kind of materiality as excepts a sale of its stock by one who had knowledge of this fact, but did not disclose it to the purchaser, from the general rule of *caveat emptor*.

The complaint alleged that the insolvency of the corporation arose from the fact that defendants had failed to pay in \$10,000 of the capital stock subscribed for by them and which they had included in the \$20,000 of stock certified by them to have been paid in, coupled with the fact that they had grossly mismanaged the affairs of the company and squandered its money in paying large salaries. It did not appear that defendants were unable to pay, or that if they paid for their stock and managed the business properly, the company would not be enabled to continue its business profitably. *Held*, that it could not be said, as matter of law, that if plaintiff had communicated the facts to the intending purchaser he would not have made the purchase.

(Argued October 8, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made July 9, 1894, which affirmed an interlocutory judgment in favor of plaintiff entered upon a decision of the court overruling a demurrer to the complaint on trial at Special Term.

This action was brought to recover damages for alleged fraud.

The allegations of the complaint are substantially as follows: In October, 1891, articles of incorporation were executed by the defendants and certain other persons and filed in the proper place, which certified the forming of the Grooved Plaster Slab Manufacturing Company, under the laws of New Jersey, with a capital stock of \$150,000, \$20,000 of which had been actually paid in in cash; defendants each subscribed

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for fifty shares of the stock of said corporation, and each agreed to pay therefor \$5,000 in cash. Defendants and John Burke were afterwards elected directors, and they elected the officers of said company, the president being one of said defendants and the secretary and treasurer the other, and they were re-elected the following year and continued to perform the duties of their offices until November, 1893. On or about November 9, 1891, said defendants certified under oath that the full amount subscribed had been paid in in cash, viz., \$20,000. Shortly after the formation of the company plaintiff became the owner of 118 shares of the stock; after the formation it was solely and exclusively managed by defendants. On May 31, 1892, they declared and paid a quarterly dividend of two per cent, and then stated to plaintiff that a further dividend would be declared in October, and that the business had become so large it would be a dividend of twenty per cent. Prior to August, 1892, plaintiff received from various persons offers to purchase his stock for \$100 cash per share, but refused them on account of the defendant's statements. On May 31, 1892, he asked for a detailed statement of the status of affairs of the company, and defendant Stein, as treasurer, delivered to him a written statement which set forth its plant to be worth \$4,000; merchandise, outstanding accounts and cash on hand, \$41,897.73; its liabilities \$2,226.15, and that it had received in cash \$48,384, and expended \$29,268.52, leaving \$19,115.73 cash on hand. In August, 1892, plaintiff, being about to leave for Europe, asked for another statement, and defendants informed him that the business had increased materially since May 31, 1892, and the assets were much larger than stated in the statement of that date. Upon arriving in London in August, 1892, plaintiff was offered for his stock eighty dollars per share in cash, or fifty dollars per share in cash and fifty dollars more per share on January 1, 1894, if the annual dividends amounted to ten per cent. Plaintiff, relying on defendants' statements, sold ten shares of his stock on the latter offer. On his return to New York October 8, 1892, he informed defendants of the

offer he had received and they told him that he must not sell for less than par; that the business had increased enormously, the company having on hand a large number of orders and its assets having increased greatly, and that much larger dividends than ten per cent would be declared at the annual meeting. Plaintiff, relying entirely and solely on these representations, refused the offer of eighty dollars per share for his stock, and accepted the other offer and sold 100 shares of his stock on those terms. The complaint further alleged that all the defendants' statements above set forth were false, and known by them to be false when made, and were made with intent to deceive the stockholders; that only \$10,000 in cash had been paid in, and defendants had failed to pay the \$10,000 subscribed by them, and had made false entries in the books of the company to induce the stockholders to believe they had paid their subscriptions; that at the time of the statement given plaintiff in May, 1892, the assets of the company amounted only to a few thousand dollars and the cash on hand to only a few hundreds; that at the time of the August statement as to the increase in business, the business had, as matter of fact, decreased; the company had very little money on hand, was largely in debt and actually insolvent. That the fact that no dividends were declared after May 31, 1892, was due solely to gross mismanagement by defendants, who squandered its moneys and, contrary to its by-laws, paid themselves large salaries amounting to thousands of dollars. Plaintiff having been induced by defendants' false statements to refuse to sell his 110 shares of stock for eighty dollars per share, but having sold them on terms under which he received only \$5,500 in cash and was not entitled to receive any more as no dividends were declared, asked to recover \$5,500 as damages by reason of said false statements. Defendants demurred on the ground that the complaint did not set forth a cause of action.

Louis Marshall for appellant. The action cannot be treated as brought upon any other theory than for the recovery

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of damages on the ground of deceit. (*Brinckerhoff v. Bostwick*, 88 N. Y. 56.) The action is not maintainable as an action for deceit. (*Brackett v. Griswold*, 112 N. Y. 454; *Duke of Newcastle v. Clark*, 8 Taunt. 602; *Chrysler v. Canaday*, 90 N. Y. 272; *Lamb v. Stone*, 11 Pick. 527; *Bradley v. Fuller*, 118 Mass. 239.) This action must fail, since the plaintiff has shown affirmatively that he has sustained no legal damage. (*Beach v. Sheldon*, 14 Barb. 66; *Brown v. Montgomery*, 20 N. Y. 287; *French v. Vining*, 102 Mass. 132; *Bruce v. Ruler*, 2 M. & R. 3; *Douglass v. McFadden*, 15 Kans. 336; *Paddock v. Strobridge*, 29 Vt. 470; *Maynard v. Maynard*, 49 id. 297; *Cecil v. Spurger*, 33 Mo. 462; *Patterson v. Kirkland*, 34 Miss. 423; *Koehler v. Sanders*, 122 N. Y. 76; *Deobald v. Opperman*, 111 id. 676; *Story v. Conger*, 36 id. 676; *Hutchins v. Hutchins*, 7 Hill, 104; *Miller v. Zeimer*, 111 N. Y. 441; *Dung v. Parker*, 52 id. 494.)

William J. Lippmann for respondent. All the elements of an action for deceit are set forth in the complaint. (Cooley on Torts, 474, 475; *Detroit v. Webber*, 26 Mich. 484; *Long v. Marvin*, 15 id. 60.) While it is conceded that a mere promise made in the course of negotiations which is never performed, is not of itself a fraud, or the evidence of a fraud, still a promise is sometimes the very device resorted to for the purpose of accomplishing the deception. (5 Am. & Eng. Ency. of Law, 334; *Morrell v. Blackman*, 42 Cow. 324; *Oldham v. Bently*, 6 B. Mon. 430; *Rawdon v. Blatchford*, 1 Sandf. 344; *Schufeldt v. Schnitzler*, 21 Hun, 462; *Johnson v. Morrell*, 2 Keyes, 663; *Eaton v. Avery*, 83 N. Y. 31; *Burrill v. Stevens*, 73 Maine, 395; *Nichols v. Pinner*, 18 N. Y. 306; *Buckley v. Artcher*, 21 Barb. 585.) The claim that there was no affirmative action on the part of the plaintiff is untenable. (*Hubbell v. Meigs*, 50 N. Y. 480.) Fraud and deceit in defendant and damage to plaintiff are sufficient, though no benefit accrue to defendant. The action will lie

wherever there has been an assertion of a falsehood with a fraudulent design as to a fact when a direct and positive injury arises from it. (*White v. Merritt*, 7 N. Y. 352; *Williams v. Wood*, 14 Wend. 146; *Hubbard v. Briggs*, 31 N. Y. 518; *Terwilliger v. G. W. T. Co.*, 59 Ill. 249; *Booth v. Wonderly*, 36 N. J. 250; *Reese River Co. v. Smith*, L. R. [43 E. & I. App.] 64; *Peck v. Gurney*, L. R. [13 Eq. Cas.] 79; *Henderson's Case*, L. R. [5 Eq.] 249; *Paddock v. Fletcher*, 42 Vt. 389; *Hard v. Seeley*, 47 Barb. 428; *Newton v. Porter*, 5 Lans. 416; *Beach v. Sheldon*, 14 Barb. 66; *Story's Eq. Juris.* 205, 208.)

PECKHAM, J. The defendants insist that there is no legal fraud alleged in the complaint, and that even if there be such allegation the complaint does not contain any statement showing that legal damage can flow from the fraud.

We think the complaint is good in both particulars. The first ground upon which the defendants allege the action is not maintainable is founded upon the statement that the plaintiff was not induced to take affirmative action by defendants' false representations, but that he simply remained passive, did nothing, and refrained from selling his stock at a price which would have been more advantageous to him than that at which he in fact sold.

The plaintiff did not remain passive. He had received two different offers from one who was also a stockholder and who offered to purchase from him his stock. The one offer was \$80 cash per share; the other was \$50 cash, with the right to another \$50 per share in Jan., 1894, in case the company should in the meanwhile have paid dividends for 1893 equal to ten per cent. The plaintiff asked these defendants for facts in relation to the condition of the company upon which he might make up his mind which offer to accept, and they were informed of the character of the two offers and of the reasons for his inquiries. The defendants being directors and knowing the facts, and for the purpose of deceiving the plaintiff, made statements in regard to the condition of the company

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which they knew to be false, and they did it for the purpose of making him believe, for reasons of their own, that the business of the company was flourishing, and they advised him not to sell his stock at less than par. The plaintiff relied upon these false statements of the defendants thus made to him, which they knew were false, and which they made with a fraudulent purpose, and he, because of the false representations, accepted the offer for the purchase of his stock at the above-mentioned \$50 cash rate per share with the conditional promise of \$50 more, instead of taking the \$80 cash. Instead, therefore, of remaining passive the plaintiff took affirmative action, induced thereto by the fraudulent statements of the defendants. We do not, however, mean to imply the correctness of the doctrine advanced by the counsel for the defendants, that if a person simply refrain from acting, induced thereto by the fraud of another, he can in no case recover damages sustained by him on account of such fraud. Such a case is not here now. Here the plaintiff alleges he has sustained damages because the company was in such a condition pecuniarily at the time of his sale of the stock that it would have been better for him in the money result if he had accepted the \$80 cash instead of the \$50 conditional offer of purchase which was made to him, and that he would have sold at the former price if the defendants had told him the truth. He had two courses open in selling his stock, and the defendants knew it, and he was induced to take the one from which he has suffered loss because of the fraudulent representations of defendants. It is not alone a failure to sell, but there is also an actual sale produced by the fraud of the defendants. The damage arises from the sale at one price, coupled with the fact that plaintiff would have sold at the other price but for the fraudulent representations of the defendants. The fact that their chief purpose was to induce by means of these false representations a belief on the part of the plaintiff that the company was prosperous, and that their representations were not specially and solely made to induce the plaintiff to sell his stock at one figure rather than another,

is, in the light of all the facts, not material. The defendants knew the reason for and the purpose of the plaintiff's inquiries, and they knew that the direct, proximate and natural result of their fraudulent representations would in that particular case be the sale of the plaintiff's stock by him at the conditional sale at par, rather than the absolute cash one. They must, therefore, be held to have intended what was the natural and direct result of their misrepresentations, although such misrepresentations were not specially induced by a design to bring about such sale.

They cannot in such case shelter themselves under the statement that they did not make the representations, *i. e.*, commit the fraud with the motive or for the purpose of inducing the plaintiff to sell his stock. They intended to deceive the plaintiff and they were induced thereto by other causes, yet the natural, proximate and direct result of such deception they knew or had reasonable ground for believing would be this sale, although its accomplishment was not the particular purpose of their fraud. In such case their liability would seem to be plain.

There is nothing in the case of *Brackett v. Griswold* (112 N. Y. 454) which runs counter to this doctrine. In that case it was asserted what there can be no doubt about, that to sustain a recovery in an action for fraud and deceit, the fraud and injury must be connected. The one must bear to the other the relation of cause and effect, and it must be seen in an appreciable sense that the damage flows from the fraud as the proximate and not as the remote cause.

The complaint in this case we hold shows such to be the case. From the allegations in the complaint, if properly denied, it might be a question for the jury to decide whether the plaintiff, if the truth had been told him, would or would not have sold his stock at the rate of \$80 cash. The demurrer admits that he would. Having two offers for the purchase of his stock, the inference might be drawn from all the facts stated that if the truth had been told by defendants the plaintiff would have sold at the \$80 cash price. The inference

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arising from all the facts alleged, that he would have done so if the truth had been told, is neither too remote, indefinite or contingent to form part of the basis of a cause of action. The case differs widely in these respects from *Bradley v. Fuller* (118 Mass. 239) and cases therein cited. What a person would have done, but did not do because (as he alleges) of the fraud of another, may not always be a matter of such vague conjecture as to render the question incapable of that degree of proof upon which courts of justice may properly act.

Cases may readily suggest themselves where such possible action would be too problematical and vague to base any verdict upon it. Some of the cases cited in the Massachusetts case (*supra*) would seem to be of that nature. In the case under consideration we think the complaint presents facts from which a jury ought to be permitted to decide the issue whether or not, but for the fraud, the plaintiff would have sold at the cash price. We are, therefore, of the opinion that the complaint contains allegations sufficient to show the commission of actionable fraud.

The other ground taken by defendants is based upon the fact that the complaint alleges that the corporation at the time of the sale of the stock by plaintiff was insolvent, and the defendants claim that if they had told the plaintiff the truth he would have known that fact, and would have been himself guilty of fraud if he did not communicate it to the intending purchaser, and if such purchaser were informed of the financial condition of the corporation it must follow as a legal conclusion that he would not have purchased the stock at all or at least at any such price as was actually received by plaintiff, and hence the latter has sustained no damage by the misrepresentations of the defendants.

In the first place, we are scarcely prepared to say as matter of law that no one would purchase stock in what he knew was an insolvent corporation at the price of \$80 a share. That might depend upon a great variety of facts, such as the cause and extent of the insolvency and whether, in the opinion of the intending purchaser, the result were remediable or final,

his familiarity with that cause, and his belief in his or his friends' ability to remedy it, his opinion of the value of the stock if the business were properly conducted, his belief in his own or his friends' ability to properly conduct it at remunerative and profitable rates and the prospect of obtaining sufficient control over the corporate action by the purchase of stock to enable the purchaser to carry out his policy and control the management of the company. Other facts may be easily imagined which would naturally have great weight with an intending purchaser even assuming the temporary insolvency.

The complaint in this case shows that the insolvency arose from the failure of the defendants to pay in the amount of the capital which they certified they had, viz., \$5,000 each out of a total of \$20,000 alleged to have been paid in, coupled with the fact that the defendants had grossly mismanaged the affairs of the company and had squandered its moneys in the payment of large salaries and had thereby crippled its business. It does not appear that the defendants are unable to respond to a demand that they pay in the amount of capital due from them, nor does it appear that if it were paid and the salaries cut down and the management changed, that the company would not be able to go on and make a profit on its business.

It cannot be said as matter of law that if the plaintiff had communicated to the intending purchaser the facts as to the condition of the company, no such sale as the plaintiff describes would have taken place and the plaintiff, therefore, would not have been damaged. But even if the defendants had informed the plaintiff that the company was insolvent when he made his inquiries of them, was he under a legal obligation to volunteer that information to the intending purchaser before the sale was made? We think not. We do not and we cannot in courts of law practically and wisely deal with mere moral obligations, such obligations as only a man of very high honor would feel himself bound by, or such duties as alone grow out of the moral obligation of doing as you would be done by. These are matters for the conscience, and they are duties which

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in the extent of their obligation open up the vast domain of ethics, into a discussion of which it is not practically possible for human courts to enter or to pronounce judgment concerning a violation of its doctrines.

There are, of course, occasions upon which it becomes the legal duty of the individual to volunteer information unasked by another, occasions where a failure to state a fact is equivalent to a fraudulent concealment and avoids a contract equally with an affirmative falsehood.

The inquiry, then, is whether, upon any particular occasion, it was the duty of the person to speak on pain of being guilty of a fraud by reason of his silence. Certain rules have been laid down by the courts which differ somewhat in their breadth and scope with the different and varying circumstances under which they are to be applied. The contract of marine or life insurance has been held to require the exhibition of the very highest good faith on the part of the person desiring insurance, and he has been held liable for the concealment of any material fact known by him to exist, although such concealment was not fraudulent. On the other hand, in the case of the contract of guaranty, it has been held that the concealment of a fact, in order to vitiate the contract, must be fraudulent, *i. e.*, concealed with a fraudulent purpose, with the intent to deceive. (*North British Ins. Co. v. Lloyd*, 10 Exchequer, 528; *Kidney v. Stoddard*, 7 Met. 252.) In regard to sales of goods, the common law has adopted a rule which is not so strict as in the above classes of contracts. The great maxim *caveat emptor* is by this law applied in a variety of cases, and unless there be some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, the vendee is bound by the sale, notwithstanding the existence of intrinsic defects and vices known to the vendor and unknown to the vendee materially affecting its value. (Story Eq. Juris., 10th ed., vol. 1, secs. 212, 212a.) This is the rule in regard to those who deal at arm's length with each other, and between whom there is no condition of special confidence or fiduciary relationship existing. In regard to the necessity

of giving information which has not been asked, the rule differs somewhat at law and in equity, and while the law courts would permit no recovery of damages against a vendor, because of mere concealment of facts under certain circumstances, yet if the vendee refused to complete the contract because of the concealment of a material fact on the part of the other, equity would refuse to compel him so to do, because equity only compels the specific performance of a contract which is fair and open, and in regard to which all material matters known to each have been communicated to the other. (1 Story Eq. Juris. sec. 206.)

And the rule of *caveat emptor*, even in regard to the sale of chattels, is applied with certain restrictions, and is not permitted to obtain in a case where it is plain it was the duty of the vendor to acquaint the vendee with a material fact known to the former and unknown to the latter. It has been held that it is the duty of one who is about to sell a flock of sheep to inform the intending purchaser of the fact, if it be known to the vendor, of the existence of a highly contagious disease among the sheep to be sold, and that it is a fraudulent suppression of a material fact if it be knowingly concealed. So, in regard to the sale of food for animal or human consumption, the law annexes an implied warranty that the food is not in an unwholesome condition and unfit to be eaten. (*Jeffrey v. Bigelow*, 13 Wend. 518; *Van Bracklin v. Fonda*, 12 Johns. 468.) In such cases the rule of *caveat emptor* cannot be applied. Again, it is not applied in its full extent to the case of sales of choses in action such as bonds and promissory notes and other obligations for the payment of money. Thus in *Brown v. Montgomery* (20 N. Y. 287) it was held to have been a fraudulent suppression avoiding the sale of a promissory note, where the vendor did not inform the vendee that the check of the maker of the note had been protested, though the informant of the vendor stated at the time his opinion that the maker of the note was solvent. And this decision rests upon the principle that one who sells commercial paper payable to bearer, and which he does not indorse, while not liable

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on the paper as a party, nevertheless warrants that he has no knowledge of any facts which prove the paper to be worthless on account of the insolvency of the makers, or because it has been already paid. A promissory note or the ordinary bond is given for one purpose only, payment at its maturity, and it is plain that in ordinary circumstances one would not take a note or bond if in possession of the fact of the insolvency of its maker. It would appear that the one purpose for which such instruments are issued would fail of accomplishment because of the inability of the maker to pay. The mere fact that the vendor offers to sell the written obligation of another to pay money is evidence enough of a warranty such as is above stated, because the vendor knows that if the maker were known to be insolvent his written obligation to pay money would not be taken.

Of the same nature is the decision in the case of *Bruce v. Ruler* (2 Man. & Ry. 3; *S. C.*, 17 Eng. Com. Law, 290), where it was held that it was the duty of the tenant who proposed to his landlord a surrender of his lease to another to be taken in his stead, to inform the landlord of the fact which the tenant knew, that the proposed tenant (who proved to be insolvent) had compounded with his creditors, and that the failure of the tenant to state such fact was a fraud which rendered him still liable for the rent. One of the most material and important facts relating to a tenant is that he shall be of sufficient ability to pay rent, or, in other words, shall not be insolvent, and Mr. Justice BAYLEY on the trial said it was to be presumed that if the landlord had known the fact he would not have accepted the man as tenant, and the suppression of the fact by the existing tenant was, legally speaking, a fraud; that it was very desirable, if possible, to *make* people honest. The same reason exists as in the above case of the sale of a written obligation to pay money, where the vendor does not indorse or become a party to the obligation, and the fact of insolvency is of such paramount importance that a presumption exists that the proposed tenant would not have been taken

if the fact were known. Solvency is among the almost absolutely necessary conditions.

Insolvency, however, is not always regarded as of so fundamental a character that its mere concealment in any transaction is in and of itself a fraud. Thus, in *Nichols v. Pinner* (18 N. Y. 295) it was held that a merchant who knew that he was insolvent and nevertheless purchased goods without disclosing that fact, there being no inquiry by the vendor, was not necessarily guilty of fraud on account of such concealment, because he might have been honestly of the opinion that he could yet go on and retrieve his affairs. That case was again before this court under the name of *Nichols v. Michael* (23 N. Y. 264), but the above doctrine was not altered or shaken. This court, therefore, recognizes that there is a great difference between the insolvency of one who is about to purchase goods and that of the maker of an obligation to pay money, which a third party desires and offers to sell, and it is seen that in the one case the failure to inform the other of the fact of such insolvency is not necessarily a fraud, and in the other its willful suppression is.

We think the present case comes more within the principle of the merchant buying goods than of the seller of commercial paper, the maker of which he knows or has good reason to believe to be insolvent. In the case as made by this complaint the vendee of the stock was already the owner of some of the stock in the same company, and plaintiff was neither a director or other officer of the company, and had no special means of acquiring information superior in the least degree to those of the vendee; the parties occupied no position of trust or confidence towards each other, and there was nothing in their relations each to the other that had in them the least element of a fiduciary nature. Each was in fact dealing, as it is called, at arm's length with the other, and we cannot say in such case that it would have been the legal duty of the vendor to volunteer the information that the company was insolvent.

The defendant was held liable in *Lefever v. Lefever* (30 N. Y. 27) because he had been guilty of false representations, and

his position as cashier put him in full knowledge of the condition of the bank, which the other did not in fact know.

In regard to a business corporation which is engaged in the transaction of business as a going concern, the mere fact that it is at the moment insolvent is not of that kind of materiality which breaks in upon and avoids the general rule in this state of *caveat emptor*.

The purchase of stock in such a corporation is made under so many different circumstances and urged by so many different motives, wholly apart from the present alleged or assumed insolvency of the corporation, that we cannot, and, as we think, ought not, to place the sale of such stock in the same class and subject to the same rules as the sale of commercial paper under the facts as stated in the *Brown* case (*supra*).

I have already alluded to some of the circumstances which might naturally induce the purchase of stock in a corporation temporarily insolvent, and it is not necessary to repeat them here. Under the rule in this state the fact suppressed may in many cases be material, and yet its suppression may not be fraudulent. If there be a legal obligation to speak, such as in a case of trust, or confidence, or superior knowledge, or means of knowledge, the case is altogether different. There is in this case the further fact that the vendee of this stock was the one who proposed the bargain and made the offer; that he was a stockholder, and presumably before he made the offer had satisfied himself, so far as he desired, as to the condition of the company, and had decided what he could, for his own purposes, properly pay for the stock. It thus appears that the plaintiff was not searching for a purchaser and making offers to sell, but that the purchaser was seeking him, and initiating the transaction by an offer to purchase. The vendor might, under such circumstances at all events, conclude that the proposed purchaser had all the knowledge he desired in order to enable him to make his offer, and the vendor might decide to accept one of the two offers proposed to him without making any statement as to the company not called for by the purchaser.

We cannot say that in the case under consideration there was a legal obligation to speak. But at the same time the least degree of misrepresentation would be very potent evidence of fraud.

We think the demurrer of the defendants is not good, and the judgment overruling it must be affirmed, with costs, with leave to defendants to plead over on payment of costs.

All concur.

Judgment accordingly.

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In the Matter of the Application of THE CITY OF BROOKLYN, Respondent, for Authority to Acquire the Property and Franchises of THE LONG ISLAND WATER SUPPLY COMPANY, Appellant.

While the legislature may not destroy and confiscate the property and franchises of a corporation, it cannot be restricted in its grants of corporate franchises which are within constitutional limitations, save by its own express agreement, even though the consequences of such a grant may be to entail loss, if not ruin, upon existing corporations through rivalry and competition.

The franchise conferred upon a corporation organized under the act providing for the incorporation of water works companies (Chap. 737, Laws of 1873, amended by chap. 213, Laws of 1881) is not exclusive in its nature; it does not give to the company the exclusive and permanent right, during the term of the corporate charter, to purvey water to the town or village to supply which it was created, and neither the statute nor the constitutional provision prohibiting legislation impairing the obligation of contracts precludes the grant of a charter to another company, that has obtained the requisite assent of the municipal authorities, authorizing it to supply water from other sources to the inhabitants of the same town or village.

By such a charter no rights are taken from the public or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey.

Dartmouth College v. Woodward (4 Wheat. 578); *Milhau v. Sharp* (27 N. Y. 611); *Mayor, etc., v. S. A. R. R. Co.* (82 id. 272); *People v. O'Brien* (111 id. 1), distinguished.

So, also, where a corporation organized under said act entered into a contract with the town for supplying it with water for a term of

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years, *held*, that in the absence of an express provision in the contract prohibiting it from so doing, the town was not precluded from making a like grant to or contract with another company for another or further supply, if the public needs required it.

A corporation was organized under said act to supply the town of New Lots with water. Subsequently the town was annexed to the city of Brooklyn. By the Annexation Act (Chap. 335, Laws of 1886) the city was prohibited from supplying water to the territory included in the town until the expiration of the charter of the company or until the city should purchase or acquire its property. *Held*, that this act did not affirm or establish an exclusive right in the company to furnish water; that it did not operate upon it, but simply bore upon the power of the city, its purpose being to protect the company's franchise in case the city did not purchase the corporate property or acquire it by condemnation proceedings as authorized by the act.

Also, *held*, that the provision of said act (§ 5) authorizing the city to acquire the property by proceedings *in invitum* was not violative of the constitutional provisions prohibiting the taking of private property except for a necessary public use, nor was it unconstitutional as authorizing the condemnation of property already devoted to a public use without designating any different or larger public use to which it was to be applied; that the public use for which it was required was sufficiently designated and was of a higher and wider scope than the use to which it was already devoted.

All private property within the state is subject to the right of the legislature to appropriate it for a necessary and reasonable public use, a just compensation being provided to be paid therefor, and there is no distinction in this respect in favor of corporations whose franchises and operations impart to them a *quasi* public character, if in order the better to subserve the public use the appropriation is necessary.

Accordingly, *held*, in proceedings under the act instituted by the city to acquire the property and franchises of the water works company, that the commissioners of appraisal properly refused to consider that the company had a right to supply water so exclusive as to preserve it from rivalry or legislation, and properly valued the franchise upon the assumption that at present the company alone had the right publicly to purvey water to the territory formerly embraced in the town; but that the exclusiveness incident to its right might at any time be taken from it by the legislature or by the local authorities acting under legislation; in determining whether to do this neither would fail to have due regard to the past investments, risks and services of the company and the reasonably just expectations of those who invested money in its work.

Reported below, 73 Hun, 499.

(Argued October 10, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 1, 1893, which reversed an order of Special Term setting aside the report of commissioners of appraisal of the franchise and property of the Long Island Water Supply Company, and which confirmed said report.

The Long Island Water Supply Company was incorporated in 1881, for a term of fifty years, under chapter 737 of the Laws of 1873, and the acts amendatory thereof. At the time of incorporation, these acts constituted the general law, which permitted the organization of water works companies in towns and villages, throughout the state. As a prerequisite to the right to incorporate, the promoters were obliged to apply to the local authorities of the town, or village, and to state in the application certain facts relating to the persons proposing to form the company, the proposed capital stock, the number and character of the shares and the sources from which the water is intended to be supplied. Such an application was made to the proper authorities of the town of New Lots and it was properly acted upon by them and granted. The certificate was, thereupon, filed, as required by the law, and the water works company became a body corporate; having the right to lay pipes, etc., for the delivery of water in the public streets and places and being "authorized and empowered to supply the authorities and inhabitants * * * with pure and wholesome water, at such rates and cost to consumers as they shall agree upon." Shortly after the incorporation, the company entered into an agreement with the town; which provided for the laying of pipes in the streets and avenues, to the extent of fifteen miles thereof, as the authorities might from time to time designate, and for the erection of hydrants, etc. The cost of supplying water was therein limited to the established charges in the city of Brooklyn, and the term of the contract was for 25 years; which was subsequently extended. Subsequently, and in 1886, chapter 335 of the Session Laws of that year was passed;

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which provided for the annexation to the city of Brooklyn of the town of New Lots. Authority was provided in that act, by section 5, for the acquisition by the authorities of the city of all the various properties and franchises of this water company, by agreement of purchase; or, in the event of inability to agree, by the right of eminent domain, to be exercised within two years. By another provision of the act, the city was inhibited from supplying water for consumption within the territory, comprehended within the town of New Lots, "until the expiration of the charter of the company, or until the city shall purchase, or acquire the property of the company as in the next section provided." Nothing in the direction of an acquisition of the water company's properties was done, until after the expiration of the period of two years; when, in 1890, an agreement was entered into for their purchase at a price equal to the sum of \$1,250,000. This contract of purchase was annulled, as the result of an action brought by a taxpayer of the city. The case came before this court and the action was held maintainable upon the sole ground that the authority to purchase did not outrun the two years mentioned in the annexation act. (*Ziegler v. Chapin*, 126 N. Y. 342, 349.)

In 1892, chapter 481 of the Session Laws of that year was enacted; which, reciting that "the public interest requires the acquisition by the city of Brooklyn, for the public use, of the reservoir, wells, machinery, pipes, franchises and all other property of the Long Island Water Supply Company," authorized the city "to acquire the same for such use by condemnation." The act required the proceeding to be instituted by the presentation of a petition to the Supreme Court, which should describe the property, name the owners and any parties having claims or liens thereupon and which should pray "that the said city may be authorized to take and hold said property and franchises forever, for the public use, * * * upon making just compensation therefor and that commissioners of appraisal be appointed to ascertain the just compensation to be made, etc." The act made provision respecting

the service of a notice of the presentation of the petition upon all parties, and for the making of an order by the court, when presented, authorizing the city "to take and hold said property and franchises forever for the public use, free of all liens, etc., upon making just compensation therefor;" and it was also provided, further, that any parties having an interest in the property or franchises "shall have a right to be heard in person, or by attorney, upon the said application, and upon any subsequent application to the court and to be heard and to present his proof upon any hearing before the commissioners."

The proceedings before the commissioners were regulated and the court, upon an application to confirm their report, was empowered to set it aside for irregularity, or for error of law, or upon the ground that the award was excessive, or insufficient. It was further provided that, upon payment of the compensation, the city shall possess the property and franchises and "hold the same in fee for the public use;" and authority was given for the issuance of city water bonds sufficient for the payment required. The city proceeded in conformity with this act and, upon the presentation of its petition, commissioners were appointed; who held hearings and took proofs and reported that a just compensation for the condemned property would be the sum of \$570,000. Their report apportioned the compensation, as follows: For the lands, the sum of \$77,500; for the buildings, pipes, machinery, materials, etc., the sum of \$292,500, and for the franchises and contract rights, "including the contract with the town of New Lots," the sum of \$200,000. In this report, the commissioners defined the nature of the company's franchises and rights, and stated the principle upon which they had proceeded for their valuation. They refused to consider that the company had any exclusive right to publicly purvey water, or a right which could not be taken away by the legislature, and they, therefore, allowed materially less as compensation, than would have been allowed, if the company's rights were so exclusive as to preserve them from rivalry, or from legislation. They valued the franchise "upon these assumptions, viz.: (1) That at

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present the water company alone has the right publicly to purvey water in the twenty-sixth ward ; (2) that the exclusiveness now incident to its right may at any time be taken from it by the legislature, or by local authorities acting under legislation, but (3) that neither the legislature nor local authorities would, in determining whether to take from the company the exclusiveness of its right, fail to have such due regard as is demanded by ample and fair public policy, to the past investment, risks and services of the company and to the reasonably just expectations which those who invested money in its work had in mind when so investing."

William C. De Witt and *Benjamin F. Tracy* for appellant. The charter of the Long Island Water Supply Company is a contract between the state and the town of New Lots upon the one hand and the water company upon the other, by which, in consideration of the money invested and the acts done by the company, the company is granted the right and franchise to supply and furnish to the town of New Lots and the inhabitants thereof pure and wholesome water during the term of its corporate existence. (*Dartmouth College Case*, 4 Wheat. 627; *People v. Roper*, 35 N. Y. 633; *Dodge v. Woolsey*, 18 How. [U. S.] 331; *S. Bank v. Knoop*, 16 id. 369.) Irrespective of the point that the state is a party to the contract, the method of incorporation under the statute, to wit, the proposition of the persons about to organize a company, upon the one hand, and the acceptance thereof by the authorities of the town, on the other hand, and the mutual establishment of the corporation, constitutes a common-law contract between the town and the water company, protected, for its entire term and in all its obligations, by constitutional law. (*Milhan v. Sharp*, 27 N. Y. 611; *Mayor v. S. A. R. R. Co.*, 32 id. 272; *Detroit v. P. Co.*, 43 Mich. 140; *People v. O'Brien*, 111 N. Y. 1; *T. Bank v. Bond*, 1 Ohio St. 670, 679; *Bailey v. Mayor*, 3 Hill, 531; *Petersburgh v. Applegrath*, 26 Am. Rep. 357; 28 Gratt. 321; 2 Pars. on Cont. 514; *Mayor v. S. A. R. R. Co.*, 32 N. Y. 271; 34 Barb. 47, SICKELS—VOL. XCVIII. 76

53; *People v. O'Brien*, 111 N. Y. 9.) The exclusive right of the water company to publicly furnish the municipality and its inhabitants with water was expressly affirmed and established by the act of the legislature annexing the town of New Lots to the city of Brooklyn. (Laws of 1886, chap. 335, § 4, p. 804; *Ziegler v. Chapin*, 126 N. Y. 342.) The exclusive character of the appellant's chartered right or franchise is in no respect in contravention of constitutional law. (*New Orleans v. Clark*, 90 U. S. 644.) The franchise of the appellant is equally inviolable by legislative power if it be deemed to have arisen from legislative grant instead of being founded on contract. (*People v. O'Brien*, 111 N. Y. 1; *Detroit v. D. & F. P. R. Co.*, 43 Mich. 140; *Ziegler v. Chapin*, 126 N. Y. 342.) In appraising the property of the appellant the commissioners proceeded upon an erroneous principle. They accepted neither the market value of the property nor its actual value as shown by its earning capacity as the basis of their award, but proceeded to create a basis of their own which rested upon mere assumption and conjecture, having no foundation either in fact, in reason or in law. (*In re Furman Street*, 17 Wend. 649; *In re William & Anthony Streets*, 19 Wend. 678, 696, 691; *T. & B. R. Co. v. Lee*, 13 Barb. 169; *Barton v. McLean*, 5 Hill, 256; *Baldwin v. Humphrey*, 44 N. Y. 614.) The commissioners were bound to award an amount sufficient to pay the actual market value of the stock and bonds of the corporation, and their failure to do so is fatal to their report. (*Henderson v. N. Y. C. R. R. Co.*, 71 N. Y. 423.) The commissioners erred in allotting the \$200,000 awarded for the franchise to the Mercantile Trust Company in part liquidation of the bonds issued upon the two mortgages of the corporation, instead of awarding it to the company for the benefit of its creditors and stockholders. (Cook on Stocks & Stockholders, § 689; *Carpenter v. B. H. G. M. Co.*, 65 N. Y. 43; *Lord v. Y. G. F. Co.*, 99 id. 547; *F. O. H. v. B. H. Assoc.*, 64 id. 561.) Whether the use for which the property is to be condemned is public or private, is not a question for the legislature, but for the court, and the legisla-

ture cannot make a use public by calling it so. (*In re Townsend*, 39 N. Y. 174; *W. W. M. Co. v. Shanahan*, 128 id. 345; *Bankhead v. Brown*, 25 Iowa, 540; *Tyler v. Beacher*, 44 Vt. 548.) The act, chapter 481, Laws of 1892, under which the appellant's property is sought to be taken, is unconstitutional and void because it designates no particular use for which the property is to be acquired, and, therefore, impresses the property with no trust in favor of the public, while at the same time it gives no opportunity for a judicial determination of the question of public or private use, and it requires condemnation of all appellant's property without reference to its character, and to the question whether it is capable or incapable of being applied to a public use. (*Embury v. Connor*, 3 N. Y. 511; *In re Cooper*, 28 Hun, 51; *People v. Smith*, 21 N. Y. 598; *In re Mayor, etc., of New York*, 135 id. 253; *In re N. Y., L. E. & W. R. R. Co.*, 99 id. 24; *P. W. W. Co. v. Bird*, 130 id. 258; *Burnett v. Mayor, etc.*, 12 Cal. 76.) The act of 1892 cannot be adjudged to be constitutional by reading into its provisions defining and limiting the use for which the condemnation of the appellant's property is authorized, and thus seeking to impose upon the property a trust not imposed by the statute. (*Bensley v. M. L. W. Co.*, 13 Cal. 306; *S. V. W. W. Co. v. S. M. W. W. Co.*, 64 id. 123.) The act, chapter 421 of the Laws of 1892, is unconstitutional, because it authorizes the condemnation of property which is already devoted to public use without designating any different or larger public use to which it is to be applied, and deprives the court of all judicial power to hear and determine whether the new use is a greater or different use from that to which the property is already devoted. (*W. R. B. Co. v. Dix*, 6 How. [U. S.] 535; *L. S. & M. S. R. Co. v. C. & W. I. R. R. Co.*, 97 Ill. 506.) The appellant had a right to introduce its scientific evidence in the affirmative and demonstrated form which the learned experts voluntarily adopted, and the commission had no right or power to compel these expert witnesses to adopt the weaker form of opinions founded upon assumption. (*Master v. Brooklyn*, 17 Hill, 61, 68, 69, 71, 72,

73; *Taylor v. Bradley*, 39 N. Y. 144; *Wakman v. W. M. Co.*, 101 id. 209, 210; *Reed v. R., W. & O. R. Co.*, 49 How. 23; *Joy v. Hopkins*, 1 Den. 84; *Hagar v. Edwards*, 4 Barb. 256; *Sickles v. Gould*, 51 How. Pr. 22; *Hawkins v. City of Fall River*, 119 Mass. 94; *Dickinson v. Inhab. of Fitchburg*, 13 Gray, 555; *I. & W. R. Co. v. Von Hom*, 18 Ill. 258; *Butler v. Herring*, 15 id. 488.) The appellant had a right to show the value of these works to the city of Brooklyn, as an ingredient of proof of their general value. (*Sturgis v. Knapp*, 33 Vt. 531.)

Thomas E. Pearsall for appellant. The decision setting aside the report of the majority of the commission should be upheld by this court, and the order of the General Term reversed. (*S. Ins. Co. v. Village of Keeseville*, 50 Alb. L. J. 9; *In re T. F. S. R. R. Co.*, 120 N. Y. 343.) It was error to admit the affidavit of the respondent's president to the tax assessors. (*Kenerson v. Henry*, 101 Mass. 152; *Hanna v. Sanford*, 20 Wkly. Dig. 288; *Heller v. Paine*, 34 Hun, 167; *Lawrence v. M. E. R. Co.*, 24 Abb. [N. C.] 70; *Roes v. M. R. Co.*, 39 N. Y. S. R. 517; *Anderson v. McAleenan*, 29 id. 406.)

Albert G. McDonald and *George G. Reynolds* for respondent. If it shall appear that the commissioners have not adopted any erroneous rule of law in the valuation of the franchise of the company, this court will not disturb their findings upon any question of fact. (Lewis on Em. Dom. §§ 135, 136, 137, 138, 274, 275; *C. R. Bridge v. W. Bridge*, 11 Pet. 420; *Stein v. B. W. S. Co.*, 141 U. S. 67; *A. P. R. Co. v. Douglass*, 5 Seld. 414; *C. B. Co. v. B. B. Co.*, 27 N. Y. 87; *F. P. B. Co. v. Smith*, 30 id. 44; *S. W. Co. v. Syracuse*, 116 id. 167, 179.) The appellant at the General Term, for the first time, claimed that the Annexation Act of 1886 (Chap. 335, Laws 1886) affirmed and established the exclusive right of the water company to furnish the former town with water. It will plainly appear that it does no such thing.

Nothing in that act forms any part of the charter or franchises of the company. (*Ziegler v. Chapin*, 126 N. Y. 331; *In re R. W. Commissioners*, 66 id. 418; *Bloomer v. Stolley*, 5 McL. 158.) Reports of commissioners of appraisal in eminent domain proceedings are not disturbed except for plain error in method or principle of treatment. (*In re Thompson*, 127 N. Y. 472; *R., etc., R. R. Co. v. Myers*, 43 N. Y. S. R. 734; *In re S. C., etc., R. Co.*, 43 id. 66; *In re Newton*, 45 N. Y. 18.) The point was made below that the commissioners have not awarded an amount sufficient to pay the actual market value of the stock and bonds of the corporation. There is no evidence in the case to show such value. (*Reed v. McConnell*, 101 N. Y. 270; *Wakeman v. N. & W. Mfg. Co.*, Id. 205.)

GRAY, J. Upon the facts, as they have been stated, the legal propositions, which seem to have been urged by the water company and which were passed upon in the court below, in their consideration of the report, as we perceive from the record and the opinions, were, in substance, that the company gained, by incorporation and by its contract with the town of New Lots, certain rights to purvey water to the town, which were exclusive and permanent, during the term of the corporate charter, and that the commissioners' award of compensation should have been based upon a recognition of the inviolable nature of the franchise and the rights of the company. Upon this appeal, a further point is raised as to the constitutionality of the act of 1892; which authorized the city to take the appellant's property. The argument of the appeal has been made with great ability; the propositions contended for have been pressed with much earnestness and the main question is of high importance; for it concerns the guaranty given to the citizen that he shall be protected in the enjoyment of his property and that it shall not be taken from him, unnecessarily and without a just compensation being made. We have, therefore, given to the question the serious consideration, which it demands.

Upon this appeal the question of the amount of the award is not one we can, or should, review. The act provides for the appointment of five commissioners, "to ascertain the just compensation to be made for the taking," (sec. 5); and, upon the application to confirm their report, the Supreme Court is authorized to confirm it, or it may set it aside for irregularity, or for error of law in procedure, or upon the ground that the award is excessive, or is insufficient. (Sec. 10.) An appeal is then permitted to the petitioner, owner, or any aggrieved person, to the General Term of the second department and "when the report is confirmed, the court shall enter a final order, which shall be binding upon all persons, etc., directing that compensation be made pursuant to the determination of the commissioners, etc." Notwithstanding a further appeal is authorized to be taken to this court (Chap. 669, Laws 1893), we are confined to the questions of law, which have arisen. We may concede that the evidence would well have justified a larger award, even upon the theory upon which the commissioners proceeded; but having found upon evidence, and their report having been confirmed by the court below, we are concluded as to the amount; if, in arriving at it, they have been guided by no erroneous rule of law. The first and prominent question, which we are called upon to consider, then, is the objection that the commissioners have erred in the legal principles, which they adopted for their guidance in valuing the property to be condemned. The objection does not so much relate to the valuation of the material property, in the lands, buildings and plant of the water company, as to the value affixed to the franchise. The commissioners refused to consider the company's franchise as exclusive in its nature, and beyond the power of the legislature, or of the local authorities acting under legislation, to affect through a similar grant to another company and the consequent rivalry. For the company, the argument may be stated to be that its charter was a contract with the state and the town of New Lots, granting to it the right and franchise to supply pure and wholesome water to the town, during the

term of its corporate existence, and that, irrespective of the question of whether the state so became a party to a contract, the dealings and proceedings with the town constituted a common-law contract; and that this contract, however it may be regarded as originating, is protected against any impairment of its obligations by the Constitution of the United States. It is, also, insisted that the contract was with the town as a proprietor and that it conferred the proprietary right to furnish water, which could not be divided, or impaired, during its term. Assuming the correctness of the definition of the capacity in which the town acted, the difficulty with the argument will be to allow its conclusion; whether that be to make the franchise an exclusive one; or to regard the grant by the town as one which makes it part with the whole proprietary right of purveying water within its limits.

Let us look at the statute, under which the water company was incorporated, and the dealings had between the appellant and the town. The act of 1873, and the amendatory acts which had been passed up to 1881, when the appellant's incorporation took place, constituted a general law of the state, under which any persons might form themselves into water works companies in towns, or villages. As a preliminary step they were, however, required to secure the assent of the particular town, or village, which it was proposed to supply with water, to an application for that purpose. That being secured, the promoters could file their certificate and become a corporate body, with all the extraordinary privileges, rights and immunities, which incorporation confers upon individuals. It is to be observed, with respect to the statute, that, while it permits of incorporation for the business purpose of supplying water, it aims mainly at the protection of the community and makes it a condition that the promoters shall set forth, not only the general facts relating to the proposed company, but, also, the intended sources of the water supply. The merit of this salutary provision is obvious. There is nothing in the statute, which, either in terms, or by apparent implication, grants to the corporation formed under it an exclusive right

to supply the town or village with water; or which precludes other persons, if they can secure an assent from the authorities to their application, from forming another company to supply water from other sources to the inhabitants of the same town, or village. The statute is general in its operation and in the grant of franchises, subject to the condition mentioned. It simply confers authority and power upon the corporation, when formed, to supply the authorities and the inhabitants of the place with water, at rates to be agreed upon. In its bearing upon the rights of the water company, I think the most to be said is, that it confers a franchise and sanctions the agreement with the municipality. Whether the charter from the state, or the agreement with the town, be regarded as the contract, in either case, it is certainly entitled to protection against legislation, which would destroy the franchise, or which would, by some alteration of the charter, impair obligations. The company is entitled to have the clause of the Federal Constitution liberally construed, so as to secure to its franchise every immunity in such respects. It must be remembered that the question here does not turn upon the consideration of any possible destruction of the franchise by the act of the town; but upon the consideration of whether the company enjoyed freedom from competition and the impairment of the value of the franchise by the grant to others of a similar franchise. The commissioners, in awarding compensation for its franchise, separately and as distinct from the cost or value of lands and construction, have ruled that it had no such immunity and the objection goes to the principle of the appraisal. The claim of the appellant is that the commissioners should have appraised the value to it of the franchise, as though it were inviolable; not only by direct action, but by such an impairment as would be caused through granting to others a like franchise to supply water. Of course, it is plain that a franchise of the nature claimed might be of immense value, relatively to the cost, or to the moneys actually put into the enterprise by the promoters,

and that, in this case, if such were the franchise its value should have been stated at far higher figures.

The *Dartmouth College* case (4 Wheat. 518), while establishing the doctrine that a charter is a contract, cannot help out the general claim of the appellant here. In that case, the legislature attempted to alter the charter of the institution in essential respects; which concerned the number and mode of appointment of the trustees and the creation of a board of overseers, with power of control over the trustees. The charter was held to be a contract with the crown, to the obligations of which the state of New Hampshire had succeeded, and the legislation was held to be a violation of the clause in the Federal Constitution, forbidding a state from passing any law impairing the obligation of contracts. The principle enunciated has been steadily adhered to, despite criticisms, and is not questioned here; but to say that the legislature of a state, in the absence of a reserved right, cannot pass a law which repeals, or which alters, the charter of a corporation by the annexation of some new terms or conditions, does not require us to say, further, as a necessary, or logical, corollary to the proposition, that a state may not grant a franchise of a similar nature to others, which, in its exercise, may impair the value of the former grant; provided that by the terms of the former grant the state had not concluded itself from so doing. The distinction in principle is material between legislative action which impairs directly the obligations of the contract by alteration, or otherwise, and legislative action which, because authorizing a competitive or a rival scheme, may impair the value to its incorporators of the former corporate project. Any other view would tend to support a right to interfere with, or to control, the power of the state, through its legislature, to exercise its discretion in grants of franchises. We think it is clear upon authority that the statute, under which the appellant was incorporated, being couched in general terms, a charter, secured by compliance with its terms, does not grant to the company an exclusive privilege or franchise to supply water to the town, or village;

nor preclude the grant of another charter for a similar franchise. The grantee of the charter takes nothing by implication and the state is not further bound, nor restricted, than can be read in the act. This is in accord with principle and with the authorities. It was said in the case of *Proprietors of the Stourbridge Canal v. Wheeley* (2 Barn. & Ad. 793), with respect to the plaintiff's rights, that they were derived from the act of Parliament which authorized the canal, and they could "claim nothing that is not clearly given them by the act." Chancellor KENT argued for the view that such grants or franchises might be so extended by implication as to give them due effect, "by excluding all contiguous competition which could be injurious" through the creation of a rival franchise, or otherwise. (3 Kent's Com. 459.) He had reasoned for it in previous decisions. (*Ogden v. Gibbons*, 4 Johns. Ch. *150, *160; *Newburgh, etc., Turnpike Co. v. Miller*, 5 id. 101.) But this doctrine did not prevail. It was distinctly overruled in *The Charles River Bridge* case (11 Peters, 548); the doctrine of which latter case this court has repeatedly followed in its decisions; notably in the cases of *Auburn, etc., Plank Road Co. v. Douglass* (9 N. Y. 444); *Chenango Bridge Co. v. Binghamton Bridge Co.* (27 id. 87); *Power v. Village of Athens* (99 id. 592); and *Syracuse Water Co. v. Syracuse* (116 id. 167). The same doctrine was reiterated by the United States Supreme Court, as late as in *Stein v. Bienville Water Co.* (141 U. S. 67).

In the case of *The Charles River Bridge v. Warren Bridge* (11 Peters, 548) it appeared that the legislature of Massachusetts had passed an act incorporating the plaintiff for a term of years, with power to erect a bridge and to collect tolls, etc.; and that, subsequently, it incorporated the defendant, with power to erect another bridge, practically alongside of the plaintiff's bridge, and which, after the expenses of its construction had been reimbursed, should be surrendered to the state. The plaintiff charged that the act incorporating the defendant impaired the obligation of the contract between the state and the plaintiff, and was, therefore, repugnant to

the Constitution of the United States. It was claimed, in its behalf, that it had acquired an exclusive right in that line of travel, and that the prior legislative acts necessarily implied that the legislature would not authorize another and a free bridge by the side of the plaintiff's; thus rendering its bridge of no value. The case presented the question in a different form to the court, which the *Dartmouth College* case did not cover; inasmuch as there had been no alteration of the charter of the corporation. The opinion of Chief Justice TANEY elaborately discusses the question whether there was such a contract on the part of the state, as implied the agreement on its part not to authorize another bridge; which, from being free and contiguous, rendered the plaintiff's franchise of no value. It was held that such an agreement could not be implied, by reason of the settled rule of construction that in charters no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. As there were no words which imported such a contract, none could be implied. Mr. Justice STORY dissented from the conclusions reached by the court, in a learned and vigorous opinion; in which he contended, upon the authority of "the old law," for such a liberal construction of legislative grants, as would secure by implication to the grantee the enjoyment of what is granted, and insisted that the grant to the plaintiff carried with it an exclusive franchise to such a reasonable distance upon the river, as that travel would not be diverted by any new bridge. He cited the decision in the *Dartmouth College* case as apposite in its application to the case before him; but the argument of that great jurist upon the law and upon the injustice of the other view was without avail to convince a majority of his associates that the legislative grant should be extended by implication. The cases of *Stein v. Bienville Water Supply Company* (141 U. S. 67) and of *Syracuse Water Co. v. City of Syracuse* (116 N. Y. 167) are recent expositions of the doctrine, which requires a strict construction of public grants of franchises and denies to the

grantee anything by implication. Without pursuing further the discussion of the nature of the appellant's franchise, under its charter, it is our judgment that viewed as a contract, to which the state was a party, there was no grant of a right to supply water to the town, which was exclusive in its nature; or which entitled it to such immunity as would preclude another, or other incorporations for a similar object. The conclusion follows both from the nature of the general act and from the absence of proper words precluding a grant of a similar charter to other applicants.

We, then, come to the consideration of the proceedings had with the town of New Lots and the contract made subsequently to appellant's incorporation. The proposition is that the method of incorporation under the statute resulted in a common-law contract between the company and the town, protected for its entire term by constitutional law; by which all the public and proprietary right to furnish the authorities and inhabitants with water was conferred; and in the undivided and unimpaired exercise of which, during the term of the contract, the company must remain. So far as the proposition involves the construction of the statute, we need not repeat what we have said; and we need only consider what was the obligation assumed by the town of New Lots, by virtue of the part taken by it in the proceedings for incorporation. A design of the statute, as before suggested, in prescribing an application by the promoters to the town or village authorities, was to furnish some protection to the community, with respect to the establishment of water works companies. It not only is interested in knowing the facts about the proposed corporation, which is to become empowered to construct water works and to lay pipes in the public streets and places; but it is vitally concerned in knowing the sources from which it is proposed to distribute water to the inhabitants. The provision for its consent to the application, as a precautionary and politic measure, in the interests of the health of the community, is of undeniable wisdom. But how and why shall we infer that the requirements of the statute, to the effect that

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the promoters of the water company shall make a detailed application, and that the application shall be granted by the authorities, to be followed up by incorporation by certificate, result in constituting a contract between the parties, which obligates the town authorities not thereafter to contract with other parties for another supply of water; which, for some adequate reason in the circumstances, might be required? On its face, the proposition seems to repel. We may concede that the proceedings result in a contract, binding the parties to the observance of all its propositions and entitled to the protection enjoyed by ordinary contracts between individuals; but we cannot spell out from such a contract, and we are unable to infer from it, regarded in the light of the proceedings in which it was made, an agreement that no like contract should ever be made with other persons, or incorporations. Such an agreement would not be within the delegation of any express powers to the municipality; nor would it be warranted by the letter or the spirit of the proceedings; and the dictates of a sound public policy would forbid its inference. Public policy would discountenance such an agreement, as militating against the public interests and as discounting, unwarrantably, the public needs and emergencies of the community in the future. The dealings with the town authorities amounted to a proposition to form a company for the purpose of supplying water to the inhabitants from certain sources; upon which the authorities acted by voting in acceptance thereof. Under the statute, that warranted the formation of a company and authorized it to proceed with its works and the laying of pipes in the streets. The subsequent formal contract regulated the relations of the contracting parties; fixed the number of miles which the company should pipe; limited the prices to be charged and in other ways arranged for the working of the contract; but we look in vain for an agreement binding the town authorities not to make a like grant or contract to, or with others, if the public needs demand it. The contract is silent on all subjects, except what the company may, or must do. The moral view of the injustice of another similar contract, during the

life of the existing contract, pre-supposes political and social conditions rendering a further contract unnecessary. The contract with the appellant was exclusive, only in the sense that no similar one could be made which could infringe its particular property rights, but it did not prevent the town from contracting for a further, or other supply of water. Competition might impair the value of the first contract; but it could not be said that thereby there would be an invasion of the appellant's franchise, within the constitutional meaning. In our judgment, there was nothing in the contract relations with the town, which insured the company against a possible competition or rivalry in the future by another company, which should be authorized by the town authorities to be formed to purvey water. The cases of *Stein v. Bienville Water Supply Co.* (141 U. S. 67) and of *Syracuse Water Co. v. City of Syracuse* (116 N. Y. 167) cannot be slighted as authorities. The complainant, in the latter case, held its franchise under express legislative grant; but that fact cannot affect the application of the decision. The contract here was under legislative sanction and the acceptance of its proposition and the agreement by the town cannot be construed any more strongly in favor of the company, than if the franchise rested solely upon the legislative grant. In the first of the two cases mentioned, the city of Mobile had granted the sole privilege of supplying water from a certain source for a term of years and the agreement was confirmed, subsequently, by an act of the legislature of the state. The defendant was incorporated, afterwards, by an act of the legislature, for the purpose of supplying the city with water from a different source than the one which had been previously designated; and it was held that the previous contract was not impaired, within the constitutional meaning. It was said that, under the rule in the construction of grants by the public, as settled by authority, it could not be held that "a grant, under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water, drawn by means of a system of water works from a particular stream or river, prevents the state

from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in a like manner from a different stream or river." In the *Syracuse Water Company's* case, it appeared that that company had been incorporated for the purpose of supplying water to the city of Syracuse and its inhabitants and that that was the only means for such supply possessed by the city. It was claimed that its franchise conferred an exclusive right, which would be invaded if the Central City Water Works Company, with which the city of Syracuse had contracted to furnish the city with water, was permitted to exercise the privilege granted by the contract. The latter company was incorporated under the general act and this court, in its Second Division, held that "the obligation of the contract between the state and the plaintiff, represented by the franchise granted to the latter, was not impaired by the exercise by the defendant company of the privileges granted to it, in the performance of the proposed contract." Judge BRADLEY, who delivered the opinion of the court, reviewed the question of the plaintiff's rights in the light of adjudged cases and held that the grantee in public grants takes nothing, in respect of the exercise of his franchise, by inference. "Except," he said, "so far as they are by the terms of the grant made exclusive, the power is reserved to grant and permit the exercise of competing and rival powers and privileges; however injurious they may be to those taken by the prior grantee."

The question, which engages our attention, is of great interest and the discussion could be easily prolonged upon the legal principles involved and upon the authorities; but it would not be profitable to continue a discussion, the grounds of which have been gone over, in the one aspect or the other, in the decisions to which reference has been made, as well as in others referred to by counsel; even if the time were at our disposal. The authorities cited by the appellant's counsel, in support of his position as to the inviolability of the company's franchise, have not been overlooked. *Milhau v. Sharp*

(27 N. Y. 611); *Mayor, etc., v. Second Ave. R. R. Co.* (32 id. 272), and *People v. O'Brien* (111 id. 1) decided that the franchise acquired by a corporation by contract with the municipality was irrevocable and indestructible at the latter's hands, whether through the action of its officers, or by legislation. We do not assert to the contrary, now, and those cases do not controvert our present views. In none is it held that the constitutional prohibition against the impairment of contracts by legislation reaches beyond their protection from alteration or repeal, without their consent, and prevents the granting to others of similar franchises, which may impair the value of the prior grant. The legislature may not destroy, or confiscate, the property and franchise of a corporation; but it is not conceivable that the sovereign power can be restricted in its grants of corporate franchises, within constitutional limits, save by its own express agreement; even though the material consequences may be such as to entail loss, if not ruin, upon existing corporations, through rivalry and competition. Those are risks which, if they cannot be guarded against, are assumed by the grantees. The franchise of the appellant is founded upon the contract which the statute authorized with the town of New Lots. It cannot be taken away, except upon making just compensation; but in estimating its value, in condemnation proceedings, it is not to be regarded as exclusive in its nature. And it is in our view immaterial to the consideration of the question of the value of the franchise, whether it was founded upon the contract with the municipality, or in legislative grant. In either case, as no exclusive franchise was granted in terms, none could be inferred.

The appellant further urges that by force of the provisions of the Annexation Act of 1886 (Chap. 335, Laws of 1886), its exclusive right to furnish water was affirmed and established. To this view of the act we cannot assent. That act was not intended to and did not operate upon the charter of the appellant. It bore upon the powers of the city of Brooklyn, upon annexation with the new territory, and its purpose was to conditionally protect the company's franchise in that

event. We have defined its effect in the *Ziegler* case (126 N. Y. 342); when Judge FINCH, speaking for the court, said: "The plan formulated by the Annexation Act thus accomplished two things; it protected the city, if it chose to purchase, by giving it the power to condemn the company's franchise as well as its tangible property, which, under the previous acts, it could not have done (*Matter of Rochester Water Commissioners*, 66 N. Y. 418); and if the city chose not to buy, the act protected the company by excluding during its charter life the municipal competition." It was, at the most, a protective measure; induced by a regard of the possible consequences to the water company, if the municipality of Brooklyn should be disposed to take advantage of the situation upon annexation. It did not grant, and appellant's counsel do not claim that it granted, any franchise to the company; nor did it enlarge the one possessed. It was simply incidental, as the same counsel say, to the terms and conditions attached to the plan of annexation. But, if the act did not affect the franchise, its provisions were incompetent to make it more extensive and if it constituted no agreement with the company, which is not and cannot be pretended, then it was not beyond the power of the legislature, subsequently, to repeal the provision and to leave the city free to compete.

In the next place, we will briefly consider the proposition that the Condemnation Act of 1892, which authorized this proceeding, is unconstitutional and void. The important point, in the argument upon this proposition, is that the principle which forbids the taking of a citizen's property, except for a necessary public use, requires, for the validity of the legislative act, that the particular public use be designated; whereby the property becomes impressed with a trust for the benefit of the public, and that not only this act is defective in that respect, but it gave no opportunity for a judicial determination of the question of the use. In our judgment, however, while it may have been better legislation to have fixed and limited the particular use, for which the city of Brooklyn was authorized to acquire and hold the appellant's property,

the act is valid. Throughout, it declares the acquisition to be in the public interest and for the public use. Its scheme suggests that the legislature deemed the matter of the water supply of too great public importance to be left to private enterprise and that it should become a part of the great municipal system. The legislature must be presumed to be the best judge of the necessity of public works and improvements; of how they shall be instituted and of how they should be carried on so as best to subserve public ends. Of the necessity for the exercise of the right of eminent domain, the legislature is the judge; but whether the use, for which the property is to be taken, is a public use, which justifies its appropriation, is a judicial question; upon which the courts are free to decide. The opportunity for the presentation of that question and for obtaining a judicial determination upon it was distinctly provided for in this act. The act, in the first section, declared that the "public interest requires the acquisition by the city of Brooklyn, for the public use," of the properties of the water company and, in the next section, it provided for the presentation of a petition by the city at a Special Term of the Supreme Court; which, after setting forth a description of the properties and franchises and the names of the owners, or of parties having claims, or interests therein, should pray "that the said city may be authorized to take and hold said property and franchises forever, for the public use, free of all liens and incumbrances, upon making just compensation therefor, etc." Service of notice of the presentation of this petition was then next provided for and, in the fifth section, after directing the court, upon the petition being presented, to make an order authorizing the city to take and hold the property for the public use, it is further provided that "any person or corporation having, or claiming any interest whatever in the said property and franchises, shall have a right to be heard in person, or by attorney, upon the said application, etc." The application referred to plainly means that of the city, upon the presentation of the petition. It can mean nothing else; for that is the only application in

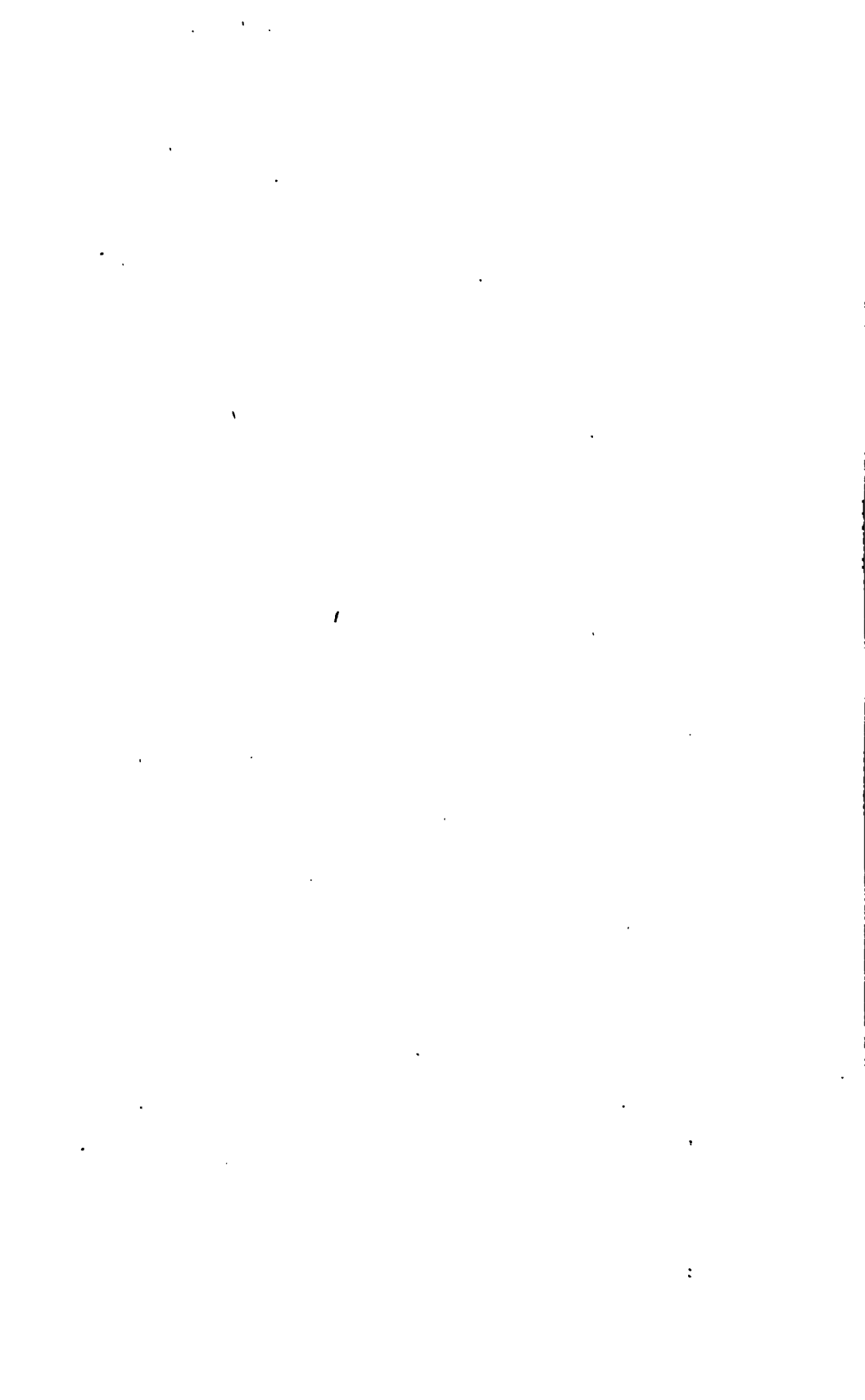
question. There was thus afforded the opportunity to raise any objections affecting the right of the city to proceed under the act in the condemnation of the appellant's property and to have them judicially heard and determined.

The appellant's other point as to the unconstitutionality of the act is, that it authorized the condemnation of property, which is already devoted to a public use, without designating any different or larger public use to which it is to be applied. We do not think that there is force in this objection. While the purpose of the water works company was public in its nature, it cannot be said to be strictly identical with the municipal purpose. A municipal corporation is a public and governmental agency. It holds property for the general benefit, with a larger scope of use. When acquired by the municipality of the city of Brooklyn, the appellant's property would become a part of a general system, under a single management and conducted essentially as a public work. If in order the better to subserve the public use the appropriation of private property is necessary, even though it be already devoted to a similar use, the right to make it is incident to the legislative power and it is necessary for the general good that the right be conceded. All property within the state is subject to the right of the legislature to appropriate it for a necessary and reasonable public use, upon just compensation being provided to be made therefor, and there can be no distinction in favor of corporations whose franchises and operations impart to them a *quasi* public character. We think it very apparent that the public use, to which the appellant's property is to be devoted by the provisions of the act, does differ and that it is of a higher and wider scope.

None of the other questions, we think, call for a further expression of opinion and our judgment is that the decision of the General Term was correct and that its order should be affirmed, with costs.

All concur.

Judgment affirmed.



MEMORANDA

OF

*CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.*

In the Matter of Opening SAINT NICHOLAS TERRACE; JOHN
F. PENTS et al., Petitioners; IRA SHAFER, Claimant.

Where lots in the city of New York were conveyed, bounded by a private street, laid out by the grantor on his own land, but not laid down on the permanent maps of the city, *held*, that the purchasers became vested with the usual private easements in the street, and that the personal representatives of the grantor were estopped from raising the question that because of the fact that by statute the grantor was prohibited from laying out any streets in the city save those laid down on said maps no such easements were created.

Reported below, 76 Hun, 209.

(Argued June 4, 1894; decided June 12, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 16, 1894, which reversed, except in certain particulars, an order of Special Term, confirming the report of a referee appointed in proceedings instituted to recover certain awards for lands taken for Saint Nicholas Terrace to "unknown owners."

The following is the opinion in full:

"We agree with the conclusions reached by the General Term and deem it unnecessary to discuss questions that must now be considered as settled in this court relating to the rights of grantor and grantee where the former sells lots to the latter bounding them on a private street laid out by the grantor on his own land.

"The petitioners on this appeal insist that no private easements were created in favor of the abutting owners on so-called Pentz street by the conveyance from Barker, the executor and trustee of the Pentz estate in 1872, to the grantor of the respondent Shafer, for the reason that the

former was prohibited by statute from laying out any street in the city of New York independently of those laid down on the permanent maps of the city and that Pentz street was not so laid down.

"We do not think the present executors of the Pentz estate can raise this question; they are estopped from making any such claim, and as between them and Shafer the latter is vested with the usual private easements in and over Pentz street.

"We do not decide the question sought to be raised.

"The city of New York has never made any objections to Pentz street.

"The order of the General Term is affirmed, with costs."

George G. Munger and J. A. Deering for appellants.

John C. Shaw for respondent.

Per Curiam opinion for affirmance.

All concur.

Order affirmed.

JOHN A. SMITH, Appellant, v. UNION MILK COMPANY, Defendant; JESSE DURLAND, Respondent.*

(Argued June 4, 1894; decided June 19, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made the first Monday of June, 1893, which affirmed an order of the Special Term granting a motion to vacate an attachment.

Henry W. Smith for appellant.

Charles J. McBurney for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed.

* Reported below, 70 Hun, 848.

In the Matter of the Guardianship of DOROTHY ANNAN; MAY EARLE, Appellant; CHARLOTTE S. RICHARDSON, Respondent.

(Argued June 4, 1894; decided June 19, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 1, 1893, which reversed so much of a decree of the surrogate of Kings county as appointed May Earle guardian of Dorothy Annan, with Charlotte S. Richardson, and directed that letters of guardianship of the person of said infant be issued to the latter.

Matthew Hale for appellant.

William C. De Witt for respondent.

Agree to dismiss appeal; no opinion.

All concur, except EARL and GRAY, JJ., dissenting.

Appeal dismissed.

HENRY W. SAGE et al., Respondents, v. SHEPARD AND MORSE LUMBER COMPANY, Appellant.

(Argued June 4, 1894; decided June 19, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made February 13, 1894, which affirmed an order of Special Term granting a motion for an order of reference and appointing a referee.

Alpheus T. Bulkeley for appellant.

James F. Cooper for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed.

EDMUND F. BENNETT, Plaintiff, *v.* JOHN I. THOMPSON et al.,
Appellants.

In the Matter of the Application of CLARA F. BENNETT to
Revive and Continue, etc., Respondent.

(Argued June 4, 1894; decided June 19, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made February 13, 1894, which affirmed an order of Special Term granting a motion to revive and continue this action.

Henry J. Speck for appellants.

George R. Donnan for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

THE CENTRAL NATIONAL BANK of Troy, Respondent, *v.* THE
FORT ANN WOOLEN COMPANY et al., Appellants.

(Argued June 4, 1894; decided June 19, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made February 13, 1894, which affirmed an order of Special Term denying a motion to vacate and set aside a warrant of attachment.

Edgar T. Brackett for appellant.

Charles E. Patterson for respondent.

Agree to affirm on opinion of Special Term.

All concur.

Order affirmed.

THE PEOPLE ex rel. AMERICAN SURETY COMPANY OF NEW YORK, Respondent, v. FRANK CAMPBELL, Comptroller, etc., Appellant.*

(Submitted June 4, 1894; decided June 19, 1894.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made December 6, 1893, which reversed a determination of the comptroller declining to revise or re-adjust the account settled against the relator for taxes for 1891.

T. E. Hancock, Attorney-General, for appellant.

John J. Crawford for respondent.

Agree to affirm on prevailing opinion below.

All concur.

Order affirmed. _____

ALMEDA WATERBURY, Respondent, v. JAMES ELIPHALET WATERBURY, Defendant; HARRIET E. DREW, Appellant.

(Submitted June 4, 1894; decided June 19, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 12, 1894, which affirmed an order of Special Term denying a motion to vacate an attachment.

M. N. Kane for appellant.

J. V. D. Benedict for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

* Reported below, 74 Hun, 101.

JAMES V. S. WOOLEY, Appellant, v. MARIE FRIEDLANDER,
Respondent.

(Argued June 6, 1894; decided June 19, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made at the February term, 1893, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

J. Treadwell Richards for appellant.

Benjamin N. Cardozo for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

PASQUALE STREPPONE, Respondent, v. WILLIAM F. LENNON,
Appellant.

A provision in a building contract that the contractor will "do" a certain amount of "brick work" may mean simply the work of laying the brick, or it may include the furnishing as well as laying them, and parol evidence is competent in such case to show the sense in which the parties used the words.

(Argued June 6, 1894; decided June 19, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made March 24, 1894, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to foreclose a mechanic's lien for a balance due for services rendered and material furnished by plaintiff in the erection of certain houses for defendant in the city of New York, and for a reformation of the contract under which the services were rendered and materials furnished. The contract, after providing that plaintiff shall do all the digging necessary, is in these words:

"I also agree to do all the mason work below the first tier of beams (except brick piers), including area walls, pier foundations, etc., etc., and furnish all the building stone for the same, for the sum of eight cents per cubic foot, measured in the wall, all openings to count solid, all walls to count two feet thick, all stones to lay flat, all walls to be well bonded, built to a line and both sides properly pointed, levelled up at least every three feet in height and have headers running through the wall at least every three feet in height and every four feet in length.

"This estimate includes all brick work below the first tier of beams, except the piers under the girder.

"I also agree to furnish and lay in position all the bottom stones, for the sum of thirty-six cents per running foot, said stones to be not less than three feet long, two feet wide and one foot thick.

"All said work to be done to your satisfaction and in a good workmanlike manner, and to be paid for when completed."

Further facts are stated in the opinion, which is given in full :

"The substantial question argued in this case respects the construction of one sentence in the written contract between the parties. The work which the plaintiff contracted to do was a certain amount of excavation and mason work necessary for the construction of five houses. In the plaintiff's proposition he said: 'I also agree to do all the mason work below the first tier of beams,' and added, 'This estimate includes all brickwork below the first tier of beams except the piers under the girder.' The plaintiff did the stipulated work, but did not furnish the brick, and called upon defendant for them, who supplied them, and now seeks to charge their value against plaintiff's claim on the ground that the contract required him to furnish them. Evidence was given, under objection, to show what the parties themselves meant and understood by the disputed language, and also what it meant in the usage of the trade; the defendant insisting that such proof was inadmissible because the written contract required plaintiff to furnish the brick, and needing no explanation, could not be contradicted; while the

plaintiff insists that the writing requiring him to do the brickwork did not include the furnishing of the material, and at all events was sufficiently ambiguous to justify a parol explanation.

"An agreement to 'do' an amount of 'brickwork' may mean simply to perform the work of laying the brick, or in addition to furnish the brick as well as lay them. A recurrence to another portion of the contract throws some light upon the interpretation. The plaintiff in agreeing to do the stone work, describes it as 'mason work,' but adds 'and furnish all the building stone for same.' He evidently understood that 'mason' work meant only the labor, unless coupled with an agreement to furnish the materials: and since no such agreement accompanied the proposition to do the brickwork it is a natural supposition that only the labor was intended. Plaintiff called upon defendant for cement, which the latter furnished, and concedes he was to furnish, and in exactly the same manner he was called upon to furnish and did furnish the brick, making no objection and expressing no surprise, and in making payments he seriously overpaid the plaintiff if the latter was to be charged with the brick. The plaintiff's construction is, therefore, both the possible and reasonable one, and at all events shows that the contract language, if not conclusive in plaintiff's favor, was at least ambiguous and open to explanation. The plaintiff testified that the bargain as made, and which was meant to be repeated in the contract, was for the work alone, while the defendant swears that it explicitly included the brick. I think the parol evidence was competent, and that the writing did not conclusively put upon plaintiff the burden of supplying the brick.

"No other question in the case needs comment.

"The judgment should be affirmed, with costs."

James Kearney for appellant.

Lorenzo Ulo for respondent.

All concur.

Judgment affirmed.

MORRIS RUBENS et al., Appellants, v. THE LUDGATE HILL STEAMSHIP COMPANY (Limited), Respondent.

(Argued June 6, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made the first Monday in November, 1892, which sustained exceptions taken by defendant on the trial and granted a new trial.

Wales F. Severance for appellants.

J. Parker Kirling for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

CHARLES E. PEABODY et al., Appellants, v. CHARLES A. BOUTWELL, Respondent.

(Argued June 6, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 13, 1893, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

G. B. Wellington for appellants.

Frank S. Black for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

CUNIGUNDE LISTMAN, Respondent, v. JOHN HICKEY,
Appellant.*

(Argued June 7, 1894; decided June 23, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 15, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

Sidney H. Stuart for appellant.

Samuel D. Levy for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

CLARA J. BUTLER, Respondent, v. THE MANHATTAN RAILWAY
COMPANY, Appellant.

(Argued June 7, 1894; decided June 23, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made at the April term, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Edward B. Thomas for appellant.

Gilbert D. Lamb for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

* Reported below, 65 Hun, 8.

THE SUPERINTENDENT OF THE POOR OF THE COUNTY OF CATTARAUGUS, Respondent, *v.* THE SUPERINTENDENT OF THE POOR OF THE COUNTY OF ERIE, Appellant.

(Argued June 7, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 18, 1893, which directed judgment in favor of plaintiff upon a case submitted under section 1279 of the Code of Civil Procedure.

Allen & Butterfield for appellant.

Norman M. Allen for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

DAN. S. RICHARDS, Respondent, *v.* LEVI CROOKER et al.,
Appellants.

(Argued June 7, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made December 9, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Circuit without a jury.

S. C. Millard for appellants.

D. S. Richards for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

JOHN TURNEY, Appellant, v. HENRY M. VAN GELDER et al.,
Respondents.*

(Submitted June 7, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 14, 1893, which affirmed a judgment in favor of defendants entered upon an order dismissing the complaint on trial at Special Term.

Blumenstiel & Hirsch for appellant.

E. H. Benn and *Lyman B. Bunnell* for respondents.

Agree to affirm on opinion of FOLLETT, J., below.

All concur.

Judgment affirmed. _____

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JAMES H. HAVENS, Plaintiff, v. THE WEST SIDE ELECTRIC
LIGHT AND POWER COMPANY et al., Defendants.

ELSWORTH L. STRIKER, Respondent, v. CHARLES R. VINCENT
et al., Appellants.

(Argued June 7, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 18, 1892, which modified and affirmed as modified a judgment in favor of the defendant Elsworth L. Striker, entered upon a decision of the court on trial at Special Term.

James M. Hunt for appellants.

George Bliss for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

* Reported below, 68 Hun, 481.

EMILY A. EMERSON, Respondent, v. JESSE MILTON EMERSON,
Appellant.

(Argued June 6, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 27, 1893, which modified and affirmed as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Charles J. Hardy for appellant.

Black & King for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

MARY E. STEPHENS, Respondent, v. THE HUDSON VALLEY
KNITTING COMPANY, Appellant.

(Argued June 8, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 9, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict.

Matthew Hale for appellant.

George B. Wellington for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JONAS H. LANE et al., Appellants, v. JOHN W. WHEELWRIGHT
et al., Respondents.*

(Argued June 8, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 12, 1893, which reversed a judgment in favor of the plaintiffs entered upon a decision of the court on trial at Special Term and granted a new trial.

G. A. Clement for appellants.

Hamilton Wallis for respondents.

Agree to affirm on opinion below and for judgment absolute against plaintiffs on stipulation.

All concur.

Order affirmed and judgment accordingly.

In the Matter of the Arbitration of CHARLES F. BEACH, JR.,
Appellant, v. SIMON STERNE, Respondent.†

(Argued June 8, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 10, 1893, which affirmed a judgment in favor of defendant entered upon an order of Special Term which confirmed an award by an arbitrator.

Leopold Wallach for appellant.

E. Ellery Anderson for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

* Reported below, 69 Hun, 180.

† Reported below, 67 Hun, 341.

TEY MANUFACTURING COMPANY et al., Appellants, v. STAR KNITTING COMPANY, Respondent.*

(Submitted June 11, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 15, 1893, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

Doyle & Fitts for appellants.

E. Countryman and *E. W. Douglass* for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

GEORGE MOORE, Respondent, v. THE BROOKLYN ADVERTISING COMPANY, Appellant.

(Submitted June 11, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 17, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

William J. Gaynor for appellant.

Charles H. Otis for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

* Reported below, 67 Hun, 611.

JAMES TALCOTT, Respondent, v. MORRIS LEVY et al.,
Appellants.*

(Argued June 11, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 7, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Ira Leo Bamberger for appellants.

Arthur C. Rounds for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

JACOB TOME, Respondent, v. CHARLES A. GERLACH,
Appellant.

(Argued June 12, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 13, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Hamilton R. Squire for appellant.

George T. Wardwell for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

* Mem. of decision, 8 Misc. Rep. 615.

**MARSDEN J. PERRY, Respondent, v. COUNCIL BLUFFS CITY
WATER WORKS COMPANY, Appellant.***

(Argued June 14, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 17, 1893, which modified and affirmed as modified a judgment in favor of plaintiff entered upon the report of a referee.

James L. Bishop for appellant.

George B. Ashley for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

JAMES W. GERARD, Respondent, v. FRANK H. COWPERTHWAIT, Appellant.

(Argued June 14, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made at the November term, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court and affirmed an order denying a motion for a new trial.

James L. Bishop for appellant.

H. Kettell for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

* Reported below, 67 Hun, 456.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
JOHN F. EVANS, Appellant.*

(Argued June 15, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 12, 1893, which affirmed a judgment of the Court of General Sessions of the Peace of the city and county of New York entered upon a verdict convicting defendant of the crime of grand larceny in the first degree.

Charles O. Maas for appellant.

John D. Lindsay for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
MATTHEW F. DAILEY, Appellant.†

(Argued June 15, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 20, 1893, which affirmed a judgment of the Court of Oyer and Terminer of the city and county of New York entered upon a verdict convicting defendant of the crime of assault in the third degree.

William F. Howe for appellant.

John D. Lindsay for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

* Reported below, 69 Hun, 222.

† Reported below, 73 Hun, 16.

DAVID LOWENBEIN et al., Respondents, v. HENRY FULDNER,
Appellant.*

(Argued June 15, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made January 3, 1893, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

Abram Kling for appellant.

Solon P. Rothschild for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

In the Matter of the HOLLY MANUFACTURING COMPANY, Judgment Creditor, Respondent, v. CLARENCE H. VENNER, Impleaded, etc., Judgment Debtor, Appellant.†

(Argued June 18, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 15, 1893, which affirmed an order of Special Term adjudging the appellant guilty of contempt in failing to produce certain books pursuant to a *subpœna duces tecum* on his examination in supplementary proceedings.

The following is the memorandum of opinion :

"It was the province of the court below to determine the import and significance of the facts proved in the proceeding to punish the appellant for contempt. We cannot say that it was not permissible for the court to find that he had some complicity in the mysterious disappearance of the books about the same time in New York and Boston just when they were wanted. It is still open to him to relieve

* Reported below, 2 Misc. Rep. 176. † Reported below, 74 Hun, 458.

himself from punishment by more satisfactory proof of his good faith, and of his inability without any fault on his part to produce the books.

"The order should be affirmed, with costs."

Bronson Winthrop for appellant.

David McClure for respondent.

Per Curiam mem. for affirmance.

All concur.

Order affirmed.

In the Matter of the Petition of the TRUSTEES OF THE NEW YORK AND BROOKLYN BRIDGE to Acquire Title to Real Estate of THOMAS LEAREY, Appellant; JESSIE LEAREY, Respondent.

(Argued June 18, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 12, 1894, which reversed an order of Special Term made on motion to distribute damages awarded on condemnation proceedings.

Abraham E. Fromme for appellant.

Edward M. Grout for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

JULIUS LIPMAN et al., Respondents, v. WILLIAM A. MATHESIUS, Impleaded, etc., Appellant.

(Argued June 18, 1894; decided June 23, 1894.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made November 11, 1892, which affirmed an order of Special Term

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confirming the report of a referee appointed in proceedings for the distribution of surplus moneys.

H. B. Closson for appellant.

E. A. Jacob for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed.

In the Matter of the Appraisal under the Transfer Tax Act of the Property of JOHN A. PHIPPS, Deceased.*

| | |
|------|-----|
| 148a | 641 |
| 150 | 7 |
| 143a | 641 |
| 167 | 283 |

(Argued June 18, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made April 20, 1894, which reversed an order of the surrogate of the county of New York affirming an order of said surrogate fixing the amount of the inheritance tax upon the estate of John A. Phipps, deceased.

Edgar J. Levey for appellants.

J. Hampden Dougherty for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed.

MARGARET HAYES, as Administratrix, etc., Appellant, v. CONSOLIDATED GAS COMPANY OF NEW YORK, Respondent.

Where a plaintiff rightfully claims a preference on the trial calendar, and the defendant does not oppose the motion, but the same is denied by the courts, plaintiff's remedy is not by appeal but, *it seems*, by mandamus to compel the trial judge to do his duty.

(Argued June 18, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made

* Reported below, 77 Hun, 325.

May 9, 1894, which affirmed an order of Special Term denying a motion for preference on calendar.

The following is the opinion in full:

"This action was brought in the New York Common Pleas by the plaintiff to recover damages against the defendant for negligently causing the death of the intestate, and she claimed a preference upon the trial calendar under section 791 of the Code, on the ground that she was administratrix, and as such sole plaintiff. Her claim was undoubtedly well founded. But she is without relief in this court. She has no respondent upon this appeal. The defendant did not oppose her motion for a preference, and did not appear at the General Term, and has not appeared in this court. Her controversy is with the trial judge. He refused to give her the preference claimed; refused in substance to try her case, when she claims she was entitled to have it tried. For such illegal action by the judge her remedy is not by appeal, but by *mandamus* to compel him to do his duty. Suppose a trial judge refused to try a case, or puts it over the term upon his own motion, what is the remedy of the party desiring the case to be tried? Certainly not an appeal from the determination of the judge. He or his court cannot be made a respondent upon an appeal, and the complaining party has no controversy with his adversary. Suppose we should reverse this order, how could our decision be enforced? No precept of any kind based upon it could be issued for its enforcement. The only way the trial judge could then be moved, if he still persisted, would be by *mandamus*.

"The appeal should be dismissed, without costs."

Edgar J. Levey for appellant.

Per Curiam opinion for dismissal of appeal.

All concur.

Appeal dismissed.

**MINNIE L. ACKERMAN, Respondent, v. THE THIRD AVENUE
RAILROAD COMPANY, Appellant.**

(Argued June 18, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 9, 1894, which affirmed an order of Special Term denying a motion by defendant to re-settle case on appeal.

Frederick P. Delafield for appellant,

A. Walker Otis for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed. _____

**EDITH MASON FAXON, Respondent, v. JOHN OSCAR BALL,
Impleaded, etc., Appellant.**

(Argued June 18, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made March 17, 1894, which modified, and affirmed as modified, an order of Special Term staying plaintiff's proceedings under a judgment pending an appeal to this court.

Henry A. Forster for appellant.

William B. Hornblower for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

FREDERICK R. COUDERT et al., as Surviving Trustee, etc., v.
BLANCHE HAUEL DE LOGEROT et al., Impleaded, etc.,
Appellants.

(Submitted June 18, 1894; decided June 22, 1894.)

APPEAL from an order of the General Term of the Supreme Court in the first judicial department, made at the April term, 1894, which affirmed an order of Special Term denying a motion by the appellants for a re-sale under a judgment of foreclosure.

Albert Stickney and *Samuel H. Ordway* for appellants.

John M. Bowers and *James W. Gerard, Jr.*, for the New York Realty Company, respondent.

Lawson Lehman and *Theodore Baumeister* for *Henry Morgenthau* et al., respondents.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed. _____

MOSES R. CROW et al., Appellants, v. **WILLIAM E. COFFIN** et al., Respondents.

(Argued June 18, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 7, 1894, which affirmed an order of Special Term granting to the defendants Coffin and Stanton an extra allowance.

The following is the memorandum of the opinion:

"This is an appeal from an order affirming an order granting respondents an additional allowance of one thousand dollars.

"An examination of the voluminous record submitted on this appeal discloses that the subject-matter involved is sufficient to warrant the additional allowance granted by the court below.

"The trial judge decided this to be a difficult and extraordinary case under section 3253 of the Code of Civil Procedure.

"We see no reason for interfering in this matter.

"The order appealed from affirmed, with costs."

Albertus Perry for appellants.

Carlisle Norwood for respondents.

Per Curiam mem. for affirmance.

All concur.

Order affirmed. _____

GEORGE BLISS et al., as Executors, etc., Respondents, v.
CHARLES B. FOSDICK, Individually, etc., AMADEE SPADONE,
Petitioner, etc., Appellant.

(Argued June 19, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 18, 1894, which affirmed an order of Special Term denying a motion by Amadee Spadone to be made a party defendant in this action.

William H. Arnoux for appellants.

J. Hampden Dougherty for respondents.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed. _____

THE PEOPLE ex rel. WILLIAM G. LYONS, Appellant, v. NATHAN
STRAUS et al., Commissioners, etc., Respondents.

(Argued June 19, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made April 3, 1893, which affirmed the proceedings of the defendants, as commissioners of parks of the city of New York, removing the relator from

the police force of the department of parks and dismissing a writ of certiorari to review the same.

Samuel A. Noyes for appellant.

D. J. Dean for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed. _____

THE PEOPLE ex rel. **JOHN E. ROOSEVELT**, as Administrator, etc., Appellant, v. **EDWARD P. BARKER** et al., as Commissioners, etc., Respondents.

(Argued June 19, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 18, 1894, which affirmed an order of Special Term dismissing a writ of certiorari to review an assessment by defendants of the personal estate of Amos Cotting, deceased.

George C. Kobbe for appellant.

D. J. Dean for respondents.

Agree to affirm on opinion of Special Term.

All concur.

Order affirmed. _____

PERCY RICH et al. v. **THE SARGENT GRANITE COMPANY**, **SAMUEL A. NOYES**, Receiver, etc., Respondent; **MATTHEW BAIRD** et al., Appellants.

(Argued June 19, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 9, 1894, which affirmed an order of Special Term directing the issuing of a warrant for the examination of the appellants concerning the property of defendants.

Jacob Fettretch for appellants.

Samuel A. Noyes, respondent, in person.

Agree to affirm; no opinion.

All concur.

Order affirmed.

ROBERT C. BLACK et al., Respondents, v. HENRY McALEENAN et al., Appellants.

(Argued June 19, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made May 11, 1894, which reversed an order of Special Term directing plaintiffs to furnish a further bill of particulars.

George Carlton Comstock for appellants.

Joseph Fettretch for respondents.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

In the Matter of the Application of the HIGHWAY COMMISSIONERS OF THE TOWN OF BROOKHAVEN for an Order Requiring the LONG ISLAND RAILROAD COMPANY to Station Flagman at Street Crossings in Patchogue.

(Argued June 19, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 1, 1893, which affirmed an order of the County Court of Suffolk county granting the application of the petitioners.

William J. Kelly for appellant.

Timothy M. Griffing for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

CONTINENTAL NATIONAL BANK OF BOSTON, Respondent, v.
UNITED STATES BOOK COMPANY et al., Impleaded, etc.,
Appellants.*

(Argued June 19, 1894; decided June 22, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 22, 1893, which affirmed an order of Special Term which denied a motion to set aside a judgment in favor of plaintiff against the defendant Horace T. Thurber.

H. Aplington for appellants.

William B. Hornblower for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed.

HENRY HELMKE, Respondent, v. THE NEW JERSEY AND NEW
YORK RAILROAD COMPANY, Appellant.

(Submitted June 19, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Circuit without a jury.

De Forest Brothers for appellant.

W. J. Groo for respondent.

Agree to affirm on opinion of BARNARD, J., below.

All concur.

Judgment affirmed.

* Reported below, 74 Hun, 632.

DENNIS MOXLEY, Respondent, v. NEW JERSEY AND NEW YORK
RAILROAD COMPANY, Appellant.

(Submitted June 19, 1894; decided June 22, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Circuit without a jury.

De Forest Brothers for appellant.

W. J. Groo for respondent.

Agree to affirm on opinion of BARNARD, J., below.

All concur.

Judgment affirmed. _____

WILLIAM H. CAMP, Respondent, v. JAMES TREANOR et al.,
Appellants.

(Submitted June 18, 1894; decided June 22, 1894.)

THIS was a motion for a re-argument. For report of the case see 142 N. Y. 478.

The following is the opinion in full:

"The learned counsel for the respondent on a motion for re-argument contends that the contract upon which this action was brought should be interpreted as containing a promise on the part of the defendants to pay to the plaintiff a percentage on the cost of the labor and materials as compensation for his services in superintending the work without regard to the pecuniary result of the enterprise or whether there was a profit or a loss. He does not claim that this is the necessary and natural import of the language which the parties have embodied in the writing itself, but from certain oral testimony given at the trial and the surrounding circumstances, including the conduct and situation of all the parties, which he insists must be read with the agreement, and when

thus read the intention of the parties was to make an agreement of the character claimed. When the language used in a contract is ambiguous or equivocal, and its meaning depends upon the sense in which the words are used in view of the subject to which they relate, the relation of the parties and the surrounding circumstances properly applicable to it, the intent of the parties becomes a matter of inquiry, and the interpretation of the language used by them is a mixed question of law and fact. (*White v. Hoyt*, 73 N. Y. 505; *Dwight v. Germania Ins. Co.*, 103 id. 341; *Kenyon v. K. T. & M. M. A. Ass.*, 122 id. 254.) This contract, if within the principle at all, is clear enough except in respect to the plaintiff's interest in it. The counsel contends that the intent was to define his compensation for services as ten per cent of the cost of labor and materials, and that he was to have that in any event. The writing says that he was to share in a certain way in any surplus and there was none. It goes further and provides in the clearest language that in case of a deficiency, or in other words a loss, he shall pay the proportion of such loss. The learned counsel has not attempted to explain this clause, and unless it can be shown that it has no application whatever to the plaintiff, then even upon the theory that the contract provided for an absolute sum to be paid to the plaintiff as compensation, the sum to which he would be entitled should be reduced by his share of the loss when ascertained upon an accounting. It may be that the writing does not express the agreement and intention of the parties, but upon the record before us we cannot so hold as matter of law, and the trial court has not so found as matter of fact. Our attention has been called to certain testimony and to circumstances tending, as is claimed, to show that the agreement was in accordance with the plaintiff's contention. The evidence is by no means conclusive. It might have justified a reformation of the contract or a finding of fact that would give interpretation to the writing in harmony with the plaintiff's contention. But, until the trial court has found that the writing does not express the intention of the parties and the agreement as they actually intended to make it, this court is not at liberty to resort to the evidence for the purpose of spelling out what

they intended to embody in the paper. We have held that the writing alone does not give to the plaintiff any sum as compensation. The language confines him to a share of the profits and subjects him to payment of his share of the loss. If a mistake was made in drafting the instrument, or if it is ambiguous or indefinite, or does not express the thought in the minds of all the parties, the trial court should find the facts and from the evidence should find just what the parties intended. The referee has not found any fact that would warrant us in going outside of the written instrument. If the case is one where an ambiguity can be solved or an omission to express in writing what the parties had in mind can be supplied by oral proof, then the particular fact which is established by such proof should be found. The referee has only found the execution of the writing, and then, without finding any other fact, has given to it an interpretation which, we think, the language will not bear.

"The motion for re-argument should be denied, with \$10 costs."

Hector M. Hitchings for motion.

Durnin & Hendrick opposed.

O'BRIEN, J., reads for denial of motion.

All concur, except GRAY, J., dissenting.

Motion denied.

ELEOTA A. DYKE, Respondent, v. WILLIAM SPARGUR et al.,
Appellants.

Where in an action of ejectment plaintiff proves a clear legal title to the land, and defendant relies upon an equitable claim, this he is bound to establish, the same as he would had he commenced an action for equitable relief.

In an action of ejectment plaintiff proved title under a sale on foreclosure of mortgages covering a tract of land including the land in question executed in 1852 by the then owner. These facts appeared from defendants' evidence. In 1861 the owner gave D. a contract for the land in question. In 1867 D. executed a conveyance thereof to R., who gave a contract therefor to H. The latter executed a conveyance thereof to

defendants. At the time of the commencement of the foreclosure suit R. was in possession. D. and R. were parties to the foreclosure suit. Neither the plaintiff in the foreclosure suit nor the purchaser at the foreclosure sale had notice of any rights or interest of H. in the land. It appeared that D. before the conveyance to R. executed a conveyance of the land to another for a good consideration; also, that neither of the contracts above specified were ever performed. *Held*, that defendants failed to show any title or equitable interests; and so, were not entitled to any relief.

(Argued June 20, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 28, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The following is the opinion in full:

"This action was commenced in August, 1881, to recover thirty-seven acres of land situated in Allegany county. It has been twice tried before referees, the trials resulting each time in a judgment for the plaintiff, and the last judgment has been unanimously affirmed by the General Term. In April, 1852, Thadeus Sherman owned a large tract of land, including the land in question, and he conveyed the entire tract to Alexander S. Diven. For the purpose of securing a portion of the purchase money, Diven and wife executed a mortgage to Sherman. On the same day they also executed another mortgage to William J. Forbes. Both of these mortgages were subsequently assigned to George M. Diven, and by him they were foreclosed, and Charles J. Langdon became the purchaser of the premises at the foreclosure sale. He subsequently, in July, 1878, conveyed the land in question with other land to the plaintiff, and it is without dispute that she thus obtained the legal title to the land.

"The defendants Spargur and Doty, under whom the other defendants justify, claim to have an equitable defense to the action and claim to a conveyance of the land growing out of the following facts: In 1854 Alexander S. Diven conveyed the entire tract of land to Jarvis Langdon, and in 1859 Langdon conveyed one-half of the land to Ballard and Sampson, and in 1861 they gave Lester Dyke a contract for two hun-

dred acres of land, which included the land in question. In 1867 Dyke conveyed the land in question to Charles Rifle, and in 1877 Rifle contracted the land to Mrs. Hodgkins; and in 1880 she conveyed the land to the defendants Spargur and Doty. Dyke and Rifle were parties to the foreclosure action, and at the time of the commencement of that action Rifle was in the possession and occupancy of the land in question, and neither Diven nor Langdon had any notice of any rights or interest of Mrs. Hodgkins in the land.

"The defendants claim, and gave some evidence tending to show, that prior to the commencement of the foreclosure action George M. Diven, by the authority of Charles J. Langdon, made a verbal agreement with Lester Dyke and all others holding contracts from or under Ballard and Sampson that if they would not interpose any obstacles in the way of the foreclosure, all their rights by virtue of their respective contracts should be protected, upon the payment of the balance due upon such contracts and their *pro rata* share of the costs of foreclosure and some taxes. Rifle did not claim from Langdon after the foreclosure sale a deed of the land in question, but he consented and requested that the deed therefor should be given to the plaintiff. To secure the purchase money of the land conveyed to her she gave to Langdon a mortgage thereon for the sum of about \$700.

"Upon these facts and others of little significance the defendants Spargur and Doty claim that they are equitably entitled to a conveyance of the land free from the last-mentioned mortgage.

"In addition to the reasons assigned in the able opinions of the two successive referees before whom this action was tried, which it would be a waste of time to repeat, the following reasons may also be given for sustaining the recovery by the plaintiff: (1) The defendants came into court confronted with the undisputed fact that the plaintiff has the legal title to the land. They rely upon an equitable claim which in their defense to this action they were bound to establish as they would have been bound to establish it if they had commenced an action for the same equitable relief.

"In September, 1865, Lester Dyke conveyed the land in

question to Ebenezer M. Robinson, by a deed acknowledged September 7th, 1865, and recorded February 22d, 1866. The deed acknowledged a consideration of \$350. Subsequently Robinson gave Dyke a mortgage for \$350, dated February 26th, 1866, and acknowledged March 10th, 1866. That mortgage was assigned by Dyke to Darius C. Judd on the 22d day of March, and the mortgage and assignment were recorded April 2d, 1866. The defendants did not at the trial offer any explanation of these documents, and they show that Dyke had parted with all his interest in the land at least a year before his conveyance of the same land to Rifle, through whom the defendants claim. It thus appears that Spargur and Doty never acquired a particle of title, legal or equitable, to the land, and that they have no standing to enforce a conveyance thereof to them by the plaintiff. It is possible that these facts admit of some explanation, but such explanation should have come from the defendants. With these facts in the record undisputed and unexplained, the title of Robinson and of the holder of his mortgage could not be subverted by a conveyance to Spargur and Doty under any judgment in this action. No facts are alleged in the answer, and none were proved upon the trial, which estop the plaintiff from disputing the conveyance of Dyke to Rifle, or any of the conveyances under which Spargur and Doty claim. At the time she took her deed from Langdon she did not have actual or implied notice that any one but Rifle had any interest in this land under the Ballard and Sampson contract, and he gave up his interest and consented to the conveyance to her.

"It is immaterial that there is no finding by the referee as to the facts relative to the deed to Robinson. Those facts are undisputed, and may be considered for the purpose of upholding the judgment.

"(2) But if the obstacle in the defendants' pathway just pointed out did not exist their defense must still fail. The title of Spargur and Doty depends upon the contract given by Ballard and Sampson to Lester Dyke. He had no deed, and when he conveyed to Rifle, if he conveyed anything, it was his interest under the contract, and he simply gave Rifle a right to a conveyance of the land from Ballard and Samp-

son, upon performance by him of the contract. Neither Dyke nor Rifle ever performed the contract, and Mrs. Hodgkins did not perform it. Nor did Spargur and Doty perform it. They did not even offer to perform it in their answer which was served about twenty years after the date of the contract, and upon the trial of the action, about thirty years after the date of the contract, there was no offer on the part of the defendants to perform the contract, and it did not appear that they were ready, willing or able to perform it. Even if any obligation rested upon Langdon or the plaintiff to protect that contract, or the persons holding or claiming any land under it, the protection was not due until they paid the balance due upon the contract, besides costs and taxes. The plaintiff stands in the place of Langdon, and she could not in any event be deprived of the land in question until payment to her in accordance with the alleged agreement upon which the defendants base their equities.

"The defendants cannot now claim that the referee ought to have provided in the judgment awarded by him that upon making such payment Spargur and Doty should have a conveyance of the land, because they did not ask for such relief and did not place themselves in a position to be entitled to it.

"(3) But passing by these obstacles to the defendants' success, there is another obstacle which they did not overcome. Mrs. Hodgkins did not have any deed of the land. She had only a contract for a deed, and when she deeded the land to Spargur and Doty she simply transferred to them her rights under her contract with Rifle, and they took her place. That contract was made in April, 1877, and has never been performed. Mrs. Hodgkins not only did not perform on her part, but actually disabled herself from performance, and Spargur and Doty never performed it—never offered to perform it, and are actually unable to perform it. Their rights depend upon that contract, and they were bound to show that they had some subsisting rights under it before they were in a position to assert any equities in this action. The plaintiff cannot be compelled to vest them with the legal title to the land while they are not entitled to a conveyance thereof from any one. Rifle has a right to be heard in refer-

ence to the performance of his contract with Mrs. Hodgkins, and he is not a party to this action. At the time of the conveyance by Langdon to the plaintiff, Rifle evidently ignored or repudiated that contract; and no one can say, from anything appearing in this record, that he did not have the right to do so. Spargur and Doty were bound to make a case entitling them to a conveyance of the land, as if they had, as plaintiffs, brought an action for that purpose; and it is entirely clear that they did not make such a case.

"For these reasons, and those given by the learned referee whose decision is under review, the judgment should be affirmed, with costs."

William Spargur for appellants.

Charles H. Brown for respondent.

EARL, J., reads for affirmance.

All concur, except ANDREWS, Ch. J., not sitting.

Judgment affirmed.

FRED C. EDDY, as Receiver, etc., v. WILLIAMSBURGH CITY
FIRE INSURANCE COMPANY, Appellant, and GILES EVERSON,
Respondent.

SAME v. FIRE ASSOCIATION OF PHILADELPHIA, PA., Appellant,
and GILES EVERSON, Respondent.

SAME v. PHOENIX INSURANCE COMPANY OF HARTFORD, CONN.,
Appellant, and GILES EVERSON, Respondent.

SAME v. WESTCHESTER FIRE INSURANCE COMPANY OF NEW
YORK, Appellant, and GILES EVERSON, Respondent.

SAME v. NEW YORK BOWERY FIRE INSURANCE COMPANY,
Appellant, and GILES EVERSON, Respondent.

SAME v. FIRE INSURANCE ASSOCIATION OF LONDON, ENGLAND,
Appellant, and GILES EVERSON, Respondent.

Argued and decided with *Eddy v. London Assurance Corporation* (ante, page 311).

FRANCISCO A. PELLAS, Respondent, *v.* THORNTON N. MOTLEY
et al., Appellants.

By the terms of a contract between plaintiff and defendants T. N. M. and D. M., said defendants procured from defendant the C. N. Bank a certificate of deposit for \$5,000, a sum agreed upon as liquidated damages in case of non-performance on their part. The certificate was delivered to defendant F. to be delivered up by him on the joint order of plaintiff and T. N. M. In an action to recover the amount, it appeared that T. N. M. and D. M. wrongfully refused to carry out their contract, and that the former refused to sign a written order for the delivery of the draft to plaintiff. *Held*, that the proper form of judgment was a direction requiring the delivery of such an order; that upon receipt thereof, F. deliver the certificate to plaintiff, and that the bank, upon presentation and delivery thereof indorsed by plaintiff, pay to him the \$5,000; also, that T. N. M. and D. M. should be adjudged to pay interest on the amount from the time demand was made upon T. N. M. for the order and the costs of the action.

(Argued June 12, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 13, 1892, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to recover \$5,000, as liquidated damages for the failure and refusal of the defendants Thornton N. Motley and Daniel Macauley to perform a contract entered into with them by which plaintiff agreed to sell to them a concession for steam navigation in Nicaragua, together with certain steamers, warehouses, machine shops and other property.

The Commercial National Bank of New York and W. W. Flannagan, its cashier, were made parties defendant, as the depository and holder of a certificate of deposit of \$5,000, which had been deposited with said bank and to be delivered to plaintiff as liquidated damages upon the joint order of plaintiff and the defendant Motley in case he and defendant Macauley failed to carry out the contract.

The following is the opinion in full:

"Upon the facts found by the court the plaintiff is entitled to relief. The defense to the action was based upon alleged

false representations alleged to have been made by plaintiff to defendants Motley and Macauley, by means of which they were induced to enter into the contract in question. Those representations related to the condition of the property to be sold by the plaintiff, to its value and to the extent of the concession granted by the republic of Nicaragua to the plaintiff and which was to be assigned to the above-named defendants.

"The plaintiff denied making these alleged representations. Whether he made them or not was the issue which was tried before the court. It was sharply contested and evidence was given on both sides, and the trial court, upon a careful consideration of all of it, has found that the plaintiff did not make the representations, and that the defendants were not induced to enter into the contract by reason thereof. This finding has been carefully reviewed by the General Term of the Supreme Court, and has been approved by that tribunal, and it is of course conclusive upon us. The defendants did not base their defense upon any alleged inability to give a good title to any part of the real estate by the plaintiff. The matter of defective title is an afterthought, and has neither been set up in defendants' answer, tried by the court, or found by it to exist as a fact. The course of the trial, as evidenced by the record before us, shows this to be true. The issue upon which evidence was given was in regard to the alleged false representations as above set forth. Upon the issue thus formed the finding has been in favor of the plaintiff, and we cannot disturb it on the merits.

"There is, however, a technical difficulty regarding the form of the judgment which should be corrected. All that the defendant Flannagan had to do with the matter was to receive and keep the certificate of deposit for \$5,000 upon the agreement to deliver it up upon the joint order of plaintiff and defendant Motley, and the bank has simply promised to pay \$5,000 upon the presentation to it of the certificate of deposit. The money has been deposited with the bank by defendant Motley and others, to be paid upon the return of the certificate, as stated. It is this \$5,000 which has thus been deposited that plaintiff is entitled to recover under the terms

of the contract. The judgment should, therefore, direct that the defendant Motley shall forthwith deliver to plaintiff a written order addressed to defendant Flannagan, directing him to deliver to plaintiff the certificate of deposit, and defendant Flannagan, upon receipt of such order, shall deliver the certificate to the plaintiff. The judgment must further direct that the defendant bank shall, upon the presentation and delivery of the certificate by the plaintiff, indorsed by him, pay to him the sum of \$5,000. As neither Flannagan nor the bank has heretofore been in default, no costs should be imposed upon them. The defendants Motley and Macauley wrongfully refused to carry out their agreement, and they should pay interest on the \$5,000 from the day demand was made upon them for an order directing the bank to pay the certificate of deposit to the plaintiff, and they should also pay the costs of this action.

"The judgment must be modified in accordance with the terms of the foregoing opinion, and, as modified, it should be affirmed, with costs as against defendants Motley and Macauley."

D. M. Porter and *Alfred E. Pette* for appellants.

Henry Major for respondent.

Per Curiam opinion for modification of judgment and affirmance as modified.

All concur, except ANDREWS, Ch. J., not sitting.

Judgment accordingly.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Appellant, *v.* THE CITY OF DUNKIRK, Respondent.*

(Argued June 11, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 4, 1892, which affirmed a judgment in

* Reported below, 65 Hun, 494.

favor of defendant, entered upon a decision of the court on trial at Special Term.

George F. Brownell for appellant.

Walter D. Holt for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Appellant, *v.* THE CITY OF DUNKIRK, Respondent.*

(Argued June 14, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 21, 1892, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

Daniel H. McMillan for appellant.

Lester F. Stearns and *Walter D. Holt* for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

JOSEPH W. JOHNSON, Respondent, *v.* JAMES GIRDWOOD, Appellant.†

(Argued June 19, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made April 3, 1894, which reversed an order of Special Term sustaining a demurrer to the complaint, overruled the demurrer and directed that if defendant

* Reported below, 65 Hun, 494. † Reported below, 7 Misc. Rep. 651.

failed to answer and pay costs within twenty days of service of a copy of the interlocutory judgment upon him final judgment should be entered in favor of plaintiff.

James Dunne for appellant.

Edward S. Clinch for respondent.

Agree to affirm on opinion below, with leave to defendant to answer upon payment of costs.

All concur, except ANDREWS, Ch. J., not sitting.

Judgment affirmed. _____

GOTTHELF PACH et al., Respondents, *v.* NICOLAS GEOFFROY, Impleaded, etc., Appellant.*

(Argued June 20, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court of the first judicial department, entered upon an order made February 17, 1893, which affirmed a judgment upon the report of a referee.

Joseph Fettretch for appellant.

Charles E. O'Conner for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

WILLIAM HARRIGAN, Appellant, *v.* THE CITY OF BROOKLYN, Respondent.

(Argued June 20, 1894; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 13, 1893, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

* Reported below, 67 Hun, 401.

James C. Church for appellant.

Henry Yonge for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

MARY NIELSON, Respondent, *v.* ALICE LAFFLIN, Appellant.

(Argued June 21, 1894 ; decided October 9, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 18, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

George Clinton for appellant.

W. Caryl Ely for respondent.

Agree to affirm ; no opinion.

All concur, except ANDREWS, Ch. J., not sitting.

Judgment affirmed. _____

HARRIET WALSH, Respondent, *v.* PATRICK WALSH et al.,
Appellants.*

(Argued June 21, 1894 ; decided October 9, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made December 9, 1892, which reversed a judgment in favor of defendants entered upon a decision of the court on trial at Circuit without a jury and granted a new trial. .

E. F. Babcock for appellants.

Frederick Collin for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed and judgment accordingly.

* Reported below, 66 Hun, 297.

OTIS E. WOOD et al., as Trustees, etc., Respondents, v.
FRANKLIN C. CORNELL, Appellant.

(Argued October 8, 1894; decided October 16, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made May 18, 1894, which affirmed an interlocutory judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term overruling a demurrer to the complaint.

M. N. Tompkins for appellant.

Simeon Smith for respondents.

Agree to dismiss appeal on argument, with costs, with leave to appellant to answer in thirty days on payment of costs in that time.

All concur.

Appeal dismissed. _____

PHILIP BECKER, Respondent, v. THE TOWN OF CHERRY CREEK,
Appellant.

(Submitted October 8, 1894; decided October 23, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made April 12, 1894, which affirmed an order of Special Term which denied a motion by defendant to change the place of trial.

C. R. Lockwood for appellant.

Adelbert Moot for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

E. A. CHILDS, as Receiver, etc., Respondent, *v.* KIRK B.
CRANE et al., Appellants.

(Submitted October 8, 1894; decided October 23, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made March 27, 1894, which affirmed an order of Special Term denying a motion by defendants to compel plaintiff to separately state and number causes of action in the complaint, to make the complaint more definite and to strike out portions of it as irrelevant and redundant.

Rufus Scott for appellants.

A. L. Purdy for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed. _____

CHARLES P. HEMENWAY et al., Respondents, *v.* MORRIS F.
KNEEDSON et al., Appellants.

(Argued October 8, 1894; decided October 23, 1894.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made June 9, 1894, which affirmed an order of Special Term denying a motion by defendants to suppress depositions taken on commission.

George A. Black for appellants.

John S. Melcher for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed.

MILES O'BRIEN et al., as Receivers, etc., Respondents, v.
FREDERICK A. KURSHEEDT, Impleaded, etc., Appellant.

(Argued October 8, 1894; decided October 23, 1894.)

This case was argued and decided with *O'Brien v. Fitzgerald* (*ante*, page 377).

CLARA HARMON, Respondent, v. VANDERBILT HOTEL COMPANY, Appellant.

(Argued October 8, 1894; decided October 23, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, entered upon an order made June 18, 1894, which overruled a demurrer to the complaint and reversed an interlocutory judgment in favor of plaintiff entered upon an order of Special Term.

J. Newton Fiero for appellant.

H. D. Birdsall for respondent.

Agree to affirm order, with costs, with leave to defendant to answer within twenty days upon payment of costs; no opinion.

All concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
JAMES BURNS, Appellant.*

(Argued October 8, 1894; decided October 23, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 13, 1894, which affirmed a judgment entered upon a verdict convicting defendant of the crime of robbery in the first degree, and also affirmed an order of the Oyer and Terminer of Cayuga county granting a writ of

* Reported below, 77 Hun, 92.

habeas corpus and discharging defendant from imprisonment in state prison and remanding him to the custody of the sheriff of Cayuga county, and also affirming an order requiring defendant to show cause why he should not be remanded and imprisoned for the remainder of his term for a violation of a conditional pardon.

John H. Keef for appellant.

George W. Nellis for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
EDWARD CHRISTIAN, Appellant.*

(Submitted October 9, 1894; decided October 23, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made at the February term, 1894, which affirmed a judgment entered upon a verdict convicting defendant of the crime of arson in the first degree, and also affirmed an order denying a motion for a new trial.

A. A. Yates and *Hastings & Schoolcraft* for appellant.

Daniel Naylor for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

JOHN NORRIS, Respondent, *v.* THE BROOKLYN CITY RAILROAD
COMPANY, Appellant.

(Argued October 10, 1894; decided October 30, 1894.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made June 26,

* Reported below, 78 Hun, 28.

1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Morris & Whitehouse for appellant.

Isaac H. Maynard for respondent.

Agree to affirm; no opinion.

All concur, except GRAY, J., taking no part.

Judgment affirmed.

AUGUST WITTE, Respondent, *v.* THE BROOKLYN CITY RAILROAD COMPANY, Appellant.

(Submitted October 10, 1894; decided October 30, 1894.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made June 26, 1893, which affirmed a judgment in favor of plaintiff, and also affirmed an order denying a motion for a new trial.

Morris & Whitehouse for appellant.

Chas. J. Patterson for respondent.

Agree to affirm; no opinion.

All concur, except GRAY, J., taking no part.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* PHILIP W. FREDERICK, Appellant.*

(Argued October 10, 1894; decided October 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 8, 1894, which affirmed a judgment of the Fulton County Court of Sessions affirming a judgment entered upon the decision of a justice of the peace convicting defend-

* Reported below, 78 Hun, 86.

ant of the crime of being a disorderly person, under section 899 of the Code of Criminal Procedure, in failing to support his wife.

Frank L. Anderson for appellant.

Horton D. Wright for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

CATHERINE L. THORNLEY, Appellant, v. CHARLOTTE THORNLEY
et al., Respondents.

(Submitted October 10, 1894; decided October 30, 1894.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made May 22, 1893, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Special Term.

Anthony Barrett for appellant.

Henry A. Forster for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

CHARLES POTTER, JR., et al., Respondents, v. TRADERS'
NATIONAL BANK, Appellant.*

(Argued October 11, 1894; decided October 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 23, 1893, which affirmed a judgment in favor of plaintiffs entered upon a verdict, and also affirmed an order denying a motion for a new trial.

* Reported below, 70 Hun, 53.

David Hays for appellant.

Hector M. Hitchings for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
SARA B. CHASE, Appellant.

(Argued October 11, 1894; decided October 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 20, 1894, which affirmed a judgment of the Court of General Sessions of the Peace of the city and county of New York entered upon a verdict convicting defendant of the crime of manslaughter in the first degree.

James Edward Graybill for appellant.

John D. Lindsay for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

In the Matter of the Application of THE NIAGARA FALLS
HYDRAULIC POWER AND MANUFACTURING COMPANY,
Appellant, for the Change of the Proposed Route of THE
NIAGARA FALLS AND LEWISTON RAILROAD COMPANY,
Respondent.

(Argued October 12, 1894; decided October 30, 1894.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 28, 1893, which affirmed a determination of commissioners appointed in the above proceeding.

John L. Romer for appellant.

Herbert P. Bissell for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

**FREDERICK SCHULTZ, Respondent, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.**

(Argued October 12, 1894; decided October 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 25, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

L. F. Longley for appellant.

J. Rider Cady for respondent.

Agree to affirm; no opinion.

All concur, except GRAY, J., dissenting, and FINCH, J., not sitting.

Judgment affirmed. _____

**SUSAN CASSIDY, Respondent, v. THE CITY OF POUGHKEEPSIE,
Appellant.**

(Argued October 15, 1894; decided October 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 28, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

C. B. Herrick for appellant.

J. Morschauser for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

LUDWIG HERBST, Respondent, *v.* THE VACUUM OIL COMPANY,
Appellant.

(Argued October 16, 1894; decided October 30, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 28, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Theodore Bacon for appellant.

George Truesdale for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

ADDIE V. TUTHILL, Respondent, *v.* UNITED LIFE INSURANCE
ASSOCIATION, Appellant.

(Argued October 17, 1894; decided November 2, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 12, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Harry Wilbur for appellant.

William F. O'Neill for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

GEORGE F. VIETOR et al., Appellants, v. MORITZ BAUER et al.,
Respondents.*

(Argued October 17, 1894; decided November 2, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 30, 1893, which affirmed a judgment in favor of defendants entered upon the report of a referee.

James Dunne for appellants.

Benjamin F. Cardozo for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

JACOB KOONS et al., Appellants, v. ANDREW N. MARTIN,
Respondent.†

(Submitted October 18, 1894; decided November 2, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made February 8, 1893, which reversed a judgment in favor of defendant entered upon a decision of the County Court of Monroe county on trial without a jury and granted a new trial.

M. H. McMath for appellants.

John J. Snell for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

* Reported below, 70 Hun, 246.

† Reported below, 66 Hun, 554.

RICHARD D. ROBENS, Respondent, *v.* CHARLES R. BARRETT,
Appellant.

(Argued October 19, 1894 ; decided November 2, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 22, 1892, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

J. W. Crans for appellant.

Will W. Smith for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

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THOMAS F. OAKES, Appellant, *v.* EDWARD F. DE LANCEY,
Respondent.

(Argued October 19, 1894 ; decided November 2, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 28, 1893, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Artemas H. Holmes for appellant.

Martin J. Keogh for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

**MATHIAS LEHN, Respondent, v. THE CITY OF BROOKLYN,
Appellant.**

(Argued October 19, 1894; decided November 2, 1894.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made June 27, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict.

Henry Yonge for appellant.

James D. Bell for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

**JOHN FUROT, Respondent, v. THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY, Appellant.**

(Argued October 19, 1894; decided November 2, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 8, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Hamilton Harris for appellant.

William P. Fiero for respondent.

Agree to affirm; no opinion.

All concur, except FINCH, J., not voting.

Judgment affirmed.

PATRICK DONOVAN, Respondent, *v.* THOMAS SHERIDAN et al.,
Appellants.

(Decided November 2, 1894.)

Agree to affirm by default, with costs, and ten per cent damages for delay under section 3251 of the Code of Civil Procedure. No opinion.

All concur.

Judgment affirmed. _____

WILLIAM S. WILLIAMS, Appellant, *v.* ROBERT LINDBLOM et al.,
Respondents.

Where, upon argument of an appeal to this court from an order reversing a judgment in his favor, and granting a new trial, the appellant's counsel was reminded of the danger to which the appellant was exposed by reason of his stipulation for judgment absolute, and opportunity given him to withdraw his appeal, which he declined, and proceeded to argument, *held*, that such appellant, after a decision against him, would not be permitted to withdraw his stipulation and take a new trial.

(Submitted October 8, 1894; decided November 2, 1894.)

THIS was a motion for a re-argument and for leave to withdraw an appeal, and judgment in favor of plaintiff was entered upon the report of a referee, which was reversed by the General Term, and a new trial ordered. Plaintiff appealed to the Court of Appeals, stipulating for judgment absolute against him in case of affirmance, and the order of the General Term was there affirmed. (See Mem. of Decisions, 142 N. Y. 682.)

The following is the opinion in full:

"Upon the facts presented to us we are satisfied that the plaintiff was fully informed of the purpose and effect of the stipulation for judgment absolute upon his appeal to this court. Upon the argument here the attention of his counsel was pointedly called to the danger to which the plaintiff was exposed by the stipulation, and opportunity was then given him to withdraw the stipulation and go to a new trial under the order of the General Term. But he declined, and for reasons now stated in his affidavit he preferred to argue

the appeal and take his chances of a favorable decision. Now, after the case has been decided adversely to him, the plaintiff asks to be relieved from his stipulation so that he may take the new trial. We do not think that we ought, upon the facts now appearing, to grant the relief now asked. Appellants cannot be permitted to experiment in this way by taking the chances of success upon their appeals, and in the case of failure ask to be relieved from their stipulation.

"The chances are, upon the facts appearing, that the plaintiff will suffer no great harm by being held to his stipulation. While in consequence of the stipulation he can obtain no affirmative relief or judgment against the defendants, the only relief they can have against him is a partnership accounting and a judgment for such sum, if any, as may be found due upon such accounting.

"The motion must be denied."

J. Murray Mitchell for motion.

L. A. Gould opposed.

Per Curiam opinion for denial of motion.

All concur.

Motion denied.

THE UNITED STATES VINEGAR COMPANY, Respondent, v.
HENRY SPAMER, Appellant.

Where, after the commencement of an action by a corporation to recover an indebtedness, it becomes insolvent and a receiver of its assets is appointed, this does not affect the right of action; this may still be asserted by it and the action continued by the receiver without any substitution, so long as there is no dissolution of the corporation by judgment of the court.

(Argued October 18, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 17, 1893, which overruled defendant's exceptions and ordered judgment in favor of plaintiff on a verdict directed by the court.

The following is the *mem.* of opinion:

"This case involves the same questions as that of the same plaintiff against Schlegel,* except that in the latter case proof was given of the plaintiff's insolvency and the appointment of a receiver, and in this case there was not. The change in the title to the assets does not affect the right of action which could still be asserted by the original plaintiff. It was not dissolved by the judgment of any court, and the receiver could continue the action without any substitution. The fact that in the other case the plaintiff gave proof which was not necessary to enable it to maintain the action, which is absent in this, can make no difference in the decision. While in the former case it was unnecessary, it was harmless, and furnished no ground for complaint to the defendant. The omission to put the same proof into this case is equally unimportant. The other questions in the record have been disposed of in the *Schlegel* case."

Benno Loewy for appellant.

S. R. Ten Eyck for respondent.

O'BRIEN, J., reads for affirmance.

All concur.

Judgment affirmed. _____

ARTHUR S. GROUT, Respondent, v. JOHN B. COTTRELL,
Appellant.

(Argued October 19, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 7, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The following is the opinion in full :

"It is our duty to reverse this judgment for error in the admission of evidence on the part and behalf of the plaintiff.

"The action was for a malicious prosecution. The defendant had caused the arrest of plaintiff upon a charge of having

* See *ante*, page 537.

stolen a belt and small piece of shafting from a mill which belonged to defendant, but was occupied under a lease by plaintiff. The latter was discharged and brought this suit. At the very outset of the case and before the real controversy was reached, the plaintiff testified that he had purchased a mill of the defendant twenty-seven or twenty-eight years earlier. He was then asked by his own counsel: 'And paid some portion of it?' To which he replied: 'I paid him the interest on \$3,000 for upwards of twenty years.' The answer went beyond the scope of the inquiry, and was objected to after it was made, though without any ground stated. The court ruled that the answer might stand 'that he paid a portion of it.' It is apparent that the court meant to take, by its ruling, only so much of the answer as was directly responsive to the question, and to exclude the further statement of the amount paid. There was an exception by the defendant. The plaintiff's counsel obviously understood the ruling as I have stated it, and was dissatisfied with the partial exclusion directed by the court, for he at once asked the explicit question: 'How much did you pay?' To that question the defendant objected; the objection was overruled, and an exception taken. Thereupon the witness began to describe the whole transaction, and the trial judge interrupted, saying: 'The simple question is, how much did you pay in all?' To which the witness replied: 'I paid him in interest money on \$3,000 upwards of \$2,000 interest money: that was at seven per cent. Then I gave up the property to Mr. Cottrell.' All this had no possible connection with or bearing upon the issues to be tried. Its effect was to gain the sympathies of the jury, at the very beginning of the case, for the plaintiff as a sufferer at the hands of the defendant as an oppressor. It was entirely foreign to the issue, and the general objection was good because it could not be obviated. The trial judge himself, at a later period of the trial, seems to have been impressed with a conviction that the evidence objected to was utterly incompetent. The defendant, realizing the prejudice it might arouse in the minds of the jury, sought to prove that the property was worth \$4,500, and cost him that sum, in hopes to mitigate or avert the mischief which had been done.

And now the plaintiff objected, not at all desiring to see the effect of his evidence weakened. The court then said: 'I don't think it is competent; I will strike out the plaintiff's evidence of what he paid, for the purpose of saving any rights that you may have in the matter; the amount they paid, statements who paid it.' Thereupon the plaintiff's counsel excepted, and ventured the slender explanation: 'I thought it was competent to show his good faith in the matter that he bought the property and kept it for quite a long time.' Then the court turned to plaintiff's counsel and said: 'Do you insist on his evidence stating the amount he paid?' And on receiving an affirmative reply, added: 'Then I think I will let it stand, and let in the other and give you an exception.' It is plain that the court perfectly well understood the situation, and received the improper evidence consciously and not through inadvertence, but chose to throw the responsibility on plaintiff's counsel.

"The evidence was clearly inadmissible, and as clearly injurious to the defendant. No argument about it could make that fact plainer.

"The judgment should be reversed and a new trial granted, costs to abide the event."

B. A. Benedict for appellant.

A. P. Smith for respondent.

FINCH, J., reads for reversal.

All concur.

Judgment reversed.

THOMAS PEARSALL THORNE et al., Respondents, v. THOMAS
HENRY FRENCH, Appellant.

(Argued June 21, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made July 7, 1893, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

David Gerber for appellant.

Charles Steele for respondents.

Agree to affirm ; no opinion.

All concur, except EARL, J., dissenting.

Judgment affirmed. _____

MINNA WINTERFIELD, Appellant, v. THE SECOND AVENUE
RAILROAD COMPANY, Respondent.

(Argued October 18, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of October, 1892, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

Benno Loewy for appellant.

Payson Merrill for respondent.

Agree to affirm ; no opinion.

All concur, except ANDREWS, Ch. J., PECKHAM and O'BRIEN, JJ., dissenting.

Judgment affirmed. _____

MATHUSHEK PIANO MANUFACTURING COMPANY, Respondent, v.
JAMES PEARCE, Appellant.

(Argued October 22, 1894; decided November 27, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made the second Monday of February, 1894, which affirmed an order of Special Term granting plaintiff leave to amend his summons and complaint and appointing a receiver.

J. H. Whitelegge and *S. W. Rosendale* for appellant.

William A. Abbott for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

FREDERICK J. STUBING, Respondent, v. METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

(Argued October 22, 1894; decided November 27, 1894.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made May 18, 1894, which affirmed an order of Special Term denying a motion by defendant to set aside the service of the summons herein.

William L. Learned for appellant.

David Swits for respondent.

Agree to affirm; no opinion.

All concur except ANDREWS, Ch. J., and GRAY, J., not voting.

Order affirmed.

JULIA MULLINS, as Administratrix, etc., Respondent, v. METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

(Argued October 22, 1894; decided November 27, 1894.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1894, which affirmed a judgment in favor of plaintiff entered upon a decision of the Westchester County Court, which affirmed a judgment of a justice of the peace of the city of Yonkers.

William L. Learned for appellant.

William Riley for respondent.

Agree to affirm; no opinion.

All concur, except ANDREWS, Ch. J., and GRAY, J., not voting.

Judgment affirmed.

In the case of *Lough v. Outerbridge* (*ante*, p. 271) a re-argument was ordered December fourth. As the volume, except the index, was at that time completed, the case could not be omitted to await the result of the re-argument, without re-paging and re-printing all following that case; it was, therefore, retained.—[REP.]

PROCEEDINGS IN COURT ON THE RETIREMENT
OF HON. ROBERT EARL,
ASSOCIATE JUDGE.

Chief Judge ANDREWS read the following :

December 20th, 1894.

Ordered, That the following memorandum expressing the regret of the court at the approaching retirement of Judge ROBERT EARL from judicial duty be entered upon the minutes of the court, and a copy thereof be presented to him :

THE JUDGES OF THE COURT OF APPEALS

TO

THEIR RETIRING BROTHER,

JUDGE ROBERT EARL.

We cannot get by the inevitable separation which makes your place vacant in our judicial family without putting the regret we feel in words which you may take with you as you leave us.

How much we shall miss the unflagging industry, the swift discrimination, the watchful oversight upon which we have long depended, you will scarcely realize, while we shall feel it day by day as our work goes on. More and more you have steadily risen toward the high and difficult level which all of us strive to attain, and none of us quite reach, with a toil that has been untiring, a patience that was never exhausted, and a wealth of resources at which we often wondered.

Especially we shall miss you at the consultation table, where the capacity to see swiftly, and grasp accurately, and hold firmly the rapid succession of facts and doctrines involved in the cases as they pass in review finds its most useful field of effort. You held your place there, a sentinel never asleep, a patrol always on the alert, a guard not to be eluded ; and yet none of us, even when stopped or challenged, ever had reason

to regret the manner of the vigilance. For, however earnest the warning, or relentless the criticism, there was always kindness and courtesy behind it, and a zeal which fully subordinated pride of opinion to the sound and stable reputation of the court.

After twenty-five years of almost unbroken service, you leave us in the full maturity of your powers, laden with an invaluable experience, by force of an arbitrary rule which we may regret, but must nevertheless obey.

Be assured that you will take into your retirement our gratitude for the arduous and excellent work you have done, our appreciation of the ability which has characterized it, and beyond that, our personal respect, affection and esteem.

December 20th, 1894.

CHARLES ANDREWS,
FRANCIS M. FINCH,
RUFUS W. PECKHAM,
JOHN CLINTON GRAY,
DENIS O'BRIEN,
EDWARD T. BARTLETT.

INDEX.

ABATEMENT AND REVIVAL.

A cause of action against a domestic business corporation for injuries caused by its negligence does not abate upon its dissolution, but survives, and an action thereon is maintainable against the trustees holding the corporate property for the purposes of distribution. (§ 5, chap. 691, Laws of 1892; § 30, chap. 687, Laws of 1892.) *Marsteller v. Mills.* 398

ABORTION.

1. An indictment for abortion contained two counts—one charging the commission of the offense by the use of instruments—the other by administering a medicine or drug. The only evidence under the first count, so far as defendant was concerned, was his own testimony, which was to the effect that at a time specified he made an examination to determine whether the woman was pregnant, and after he had stated what occurred, which, if true, showed that no criminal operation was performed, he denied the use of any instrument which would have that effect. Defendant's counsel requested the court to charge that there was no evidence as to what occurred at the time stated, except defendant's testimony, and this uttery disproved that any criminal operation was performed or attempted at that time. The court refused to charge other than that there was no direct evidence of what took place, except that of defendant, and as to that the jury were not compelled to accept all of it, but might believe such as they credited and reject such as they discredited. Said counsel then requested the court to charge that there was "no evidence to

justify a finding that any criminal operation was performed or attempted" by defendant on that occasion. This the court refused. *Held, error. People v. Van Zile.* 363

2. Evidence was given on the part of the prosecution tending to support the second count in the indictment. The case was submitted on both counts and a general verdict of guilty rendered. *Held*, that this did not render the error harmless, as defendant may have been prejudiced in respect to the charge in the second count by the ruling. *Id.*

ACTION.

1. An action to remove testamentary trustees, holding title to real estate under the trust, is a purely personal action, having no connection with the title, within the meaning of the provision of the Code of Civil Procedure (Subd. 1, § 263), giving to superior city courts jurisdiction in an action to procure a judgment affecting an estate or interest in real property or a chattel real. *Paget v. Stevens.* 172

2. Even where property is in the custody of the law it is a matter of course for the court, on application made in good faith, to permit suit to be brought by a third person claiming rights therein, and if action has been brought without such permission the court will, if the conduct of plaintiff has not been willful, permit the action to proceed. *Read v. Brayton.* 342

3. While the formal demand for relief with which a complaint concludes is not conclusive as to the character of the action, *i. e.*,

whether legal or equitable, yet where the complaint sets forth facts that may support equally an action at law or equity, the character of the action is determined by the relief demanded. *O'Brien v. Fitzgerald*. 377

4. The complaint in an action brought by receivers of corporations alleged that each of the defendants had been a director of the corporation during a period stated. This showed that they had not all been directors for the same length of time or during the same period. The complaint then set forth various acts of negligence and wrong doing on the part of defendants, as directors, resulting in large losses to the corporation. A money judgment was asked against the defendants jointly for the full amount of loss claimed. There was no averment that an accounting was necessary to ascertain the damages, nor was it asserted that defendants were severally liable for separate and personal misconduct. On demurrer based upon the ground that different causes of action affecting different defendants had been improperly joined, *held*, that the action was to be regarded as one at law; and so, that the demurrer was well taken. *Id.*

See CAUSE OF ACTION.
EQUITY.
LAW.

ADJOINING OWNERS.

H., the owner of a lot adjoining that of plaintiffs, entered into a contract with defendants by which they agreed to build a house upon said lot and "to become answerable and accountable for any damages * * * to the property * * * of any neighbor * * * during the performance of said work." Defendants entered into a contract with D., by which the latter agreed to do the necessary excavation, he assuming "all responsibility for any loss or damage to persons or property" while engaged in the work, and to save defendants harmless therefrom.

In blasting rock upon said lot, while D. was engaged in the performance of his contract, plaintiff's house was injured. In an action to recover damages the evidence tended to show that the damage was caused by the negligent manner in which D. conducted the work of blasting. The trial court charged the jury that in any event the defendants were liable. *Held*, error; that defendants were not liable for negligence on the part of D.; that if there was no negligence, and the injury was the inevitable result of the blasting, no one was liable, and if defendants' contract with H. was to be treated as a contract of indemnity, it imposed no liability, as H. was not liable; that the clause referred to could not be considered as inserted for plaintiff's benefit, but even if so held, as she was not a party to the contract or in privity therewith, as to her it was without consideration and she could not enforce it. *French v. Vix*. 90

ADMISSIONS AND DECLARATIONS.

The declarations of an agent are only admissible against his principal when the agent is acting at least *prima facie* for his principal and within the scope of his actual or apparent authority. *Bank N. Y. Nat. Bkg. Assn. v. A. D. & T. Co.* 559

ADULTERY.

While the uncorroborated evidence of prostitutes alone is insufficient to sustain a charge of adultery in an action for divorce, yet slight corroboration is sufficient where the defendant fails to take the stand in his own behalf. *McCarthy v. McCarthy*. 235

ADVANCEMENT.

1. Plaintiff and the three defendants were the children and only heirs at law of P., who died intestate, owning a farm of 163 acres. In an action for partition defendants claimed that P. in his lifetime

conveyed to plaintiff's wife fifty-nine acres, then a part of the farm, three absolutely and the remainder subject to a life estate reserved by the grantor; that such conveyance was intended by P. as an advancement and as and for plaintiff's share in his father's real estate, and was accepted by the wife, with knowledge of such intent, and that plaintiff knew and acquiesced in the conveyance for such purpose. *Held*, that parol evidence was competent to show that said deed was intended as an advancement to plaintiff; also that such an advancement could be made by the conveyance to the wife; but that it was incumbent on defendants to establish by satisfactory evidence that said conveyance was in fact made as an advancement. *Palmer v. Culbertson*. 213

2. The referee found that the value of the fifty-nine acres at the time of said conveyance was one-fourth of the value of the whole farm as the intestate then owned it. Plaintiff's counsel claimed that the value of the life estate should have been deducted to "reach the worth of the property when given" to meet the requirements of the Revised Statutes. (1 R. S. 754, § 25.) *Held*, that the land in which the life estate was reserved must be deemed to have been given at the time of the death of the intestate, when the gift would first vest in possession. *Id.*
3. The consideration mentioned in said deed to plaintiff's wife was \$4,720. *Held*, it was to be presumed that this was inserted as the value of the land in the estimation of the parties at the time of the conveyance, and as this sum was undisputedly equal to one-fourth the value of the whole farm at the time of the conveyance, all controversy in respect to value was foreclosed by the statute. (1 R. S. 754, § 25.) *Id.*

ADVERSE POSSESSION.

Where land is uninclosed, uncultivated, unimproved and unoccupied, the facts that a person has for twenty years claimed title

thereto, surveyed it, marked its boundaries by monuments, cut trees thereon from time to time, and for a few years has paid taxes thereon, do not establish an adverse possession, nor do these facts, in the absence of a constructive or actual possession, authorize the presumption of a grant from the true owner. *Mission of Immaculate Virgin v. Cronin*. 524

AGREEMENT.

See CONTRACT.

ALIMONY.

1. It is within the discretion of the court in an action for divorce brought by the wife to provide that alimony shall be paid from the time of the commencement of the action. *McCarthy v. McCarthy*. 285
2. The complaint in an action for divorce brought by the wife alleged that the parties were married in this state and that plaintiff resided here. The summons was served in this state and defendant appeared and answered. The answer, after denying the commission of the offenses charged in the complaint, as a separate defense alleged that both parties were, "at all the times mentioned in the complaint," residents of the state of Pennsylvania, and that the courts of this state had no jurisdiction. To this plaintiff demurred as upon its face insufficient. Upon the pleadings and other proof which warranted a finding that the parties, before the commencement of the action, had separated, and that plaintiff was then a resident of this state as defined by the Code of Civil Procedure (§ 1768), an order was granted directing the payment by plaintiff of sums specified for counsel fee and alimony. *Held*, that the court had power to make the order; that even if the fact of residence in another state was to be deemed settled by the demurrer, the legal effect of the fact presented an issue of law which defendant had no absolute

right to have decided upon a motion, and the court has power to compel defendant to furnish plaintiff with means to meet it in the usual way; but that no such effect could be given to the pleadings upon a motion like this, in such an action. *Gray v. Gray*. 354

ANTE-NUPTIAL AGREEMENT.

The rule that where an agreement is made between parties standing in a confidential relation, or in a relation which gives to one party great influence over the other, and the agreement is to the advantage of the party in whom the confidence is reposed or whose influence is the dominant one, and to the detriment of the other party, the former will not be permitted to enforce the agreement unless it appears that he acted in the utmost good faith and that disclosure was made of all the material facts, or that the other party acted with a clear comprehension of the object and effect of the agreement, applies in favor of a wife in respect to an ante-nuptial contract, and the courts will regard with rigid scrutiny such a contract where it deprives her of any prospective interest in the estate of her intended husband, and especially where no provision is made therein for her support in case she survives him. *Graham v. Graham*. 573

APPEAL.

1. Under the provisions of the act providing for rapid transit railways in certain cities (Chap. 4, Laws of 1891, as amended by chap. 102, Laws of 1892), which makes the authorization of the Supreme Court a prerequisite to the right of a bridge company to construct and operate an elevated railway as an approach to its bridge, in case of failure to obtain the consent of property owners, the power conferred upon the court is discretionary and exclusive, and its order refusing the authorization upon the merits, where no abuse of its discretion is shown, is not reviewable here. *In re E. R. Bridge Co.* 249

2. Commissioners appointed under the General Railroad Act (Chap. 140, Laws of 1850, as amended) in proceedings to condemn lands for railroad purposes, are judges of the law and the fact so far as relates to the compensation to be awarded to landowners. When their order has been confirmed and the order of confirmation has been affirmed by the General Term of the Supreme Court, no further appeal can be taken. *In re S. B. R. Co.* 253

3. The General Term may set aside and vacate the report for errors of law or of fact, and direct a new appraisal. In which case the second report "is final and conclusive on all the parties interested" (§ 18), except in case there is some irregularity in the proceedings affecting the jurisdiction of the commissioners, or fraud, mistake or accident of such a character as would authorize a court of equity to set aside a judgment, a report of a referee or an award of arbitrators. *Id.*
4. *It seems*, where a case is brought within these exceptions, the Supreme Court may, upon motion, set aside the report of the commissioners, and if it refuses so to do, upon undisputed facts, an appeal from its determination may be taken to this court. *Id.*

5. An order confirming the report of commissioners in such a proceeding was reversed by the General Term, the report set aside and a new appraisal ordered. The second report was confirmed and the order of confirmation was affirmed by the General Term. An appeal to this court was dismissed. (141 N. Y. 532.) Thereupon the railroad company made a motion at Special Term to set aside and vacate the second report on the ground that the award made "was vitiated by error, misconduct, irregularity and mistake on the part of the commissioners." There was no claim of irregularity in the proceedings and no allegation of fraud, mistake or accident; the moving party simply alleged errors of law and fact in the determination made. The motion was de-

- nied and the order, on appeal to the General Term, was affirmed. *Held*, that the General Term order was not appealable here; that the second report, even if demonstrably erroneous, was final and conclusive. *Id.*
6. In an action to foreclose a mortgage which had been assigned by plaintiff as administrator of the mortgagee, deceased, to a third person and by the latter to plaintiff individually the defendants pleaded a defect of parties, in that the next of kin of the deceased mortgagee were not made parties. It appeared that the only next of kin were plaintiff and a sister who died without issue. It was claimed that she married and left a will. The alleged will was admitted to probate, but the surrogate's decree was reversed by the General Term, and the questions involved were sent to a jury for trial. At the time of the trial of the action these questions remained undisposed of, and no executor or administrator of the deceased sister had been appointed. The Special Term made no findings under the plea of defect of parties, but dismissed the complaint on the ground that the assignment of the mortgage was void. The General Term reversed the judgment and ordered a new trial without passing upon the question as to parties. Defendants appealed from the order giving the required stipulation. *Held*, that an order of affirmance and for judgment absolute on the stipulation was proper. *Read v. Knell.* 484
7. Where evidence tending to prove a material fact at issue in an action, but which requires proof of other facts to complete the chain of proof, is received under objection, and such other facts are not proved, the presence of the evidence in the record is no ground for reversal in the absence of a motion to strike it out. *U. S. Vinegar Co. v. Schlegel.* 537
8. Where on appeal from a judgment entered on the report of a referee, the appellant desires a review of the facts, he must insert in the record a statement that it contains all the evidence or all that is material to the question sought to be reviewed. *Dibble v. Dimick.* 549
9. No particular form of words, however, is required for this statement, and where there is a statement in the record that it contains all the testimony, and both parties proceed to argument without any objection as to the power of the General Term over the whole case, the court is warranted in assuming that all the evidence is in the case and should pass upon the facts. *Id.*
10. Where the record contained a statement that it contained all the testimony, and the order of the General Term was a general affirmance of the judgment without specifying the grounds or in any way limiting its legal effect, *held*, that the order imported that every question in the case both of law and fact had been disposed of; that to raise the point here that the General Term refused to review the facts for want of a proper and sufficient record, this should appear by a proper statement in the order, and that the fact that this appeared in the opinion of the General Term was not sufficient. *Id.*
11. Where a plaintiff rightfully claims a preference on the trial calendar, and the defendant does not oppose the motion, but the same is denied by the court, plaintiff's remedy is not by appeal but, *it seems*, by mandamus to compel the trial judge to do his duty. *Hayes v. Consolidated G. Co. N. Y.* 641
12. Where, upon argument of an appeal to this court from an order reversing a judgment in his favor, and granting a new trial, the appellant's counsel was reminded of the danger to which the appellant was exposed by reason of his stipulation for judgment absolute, and opportunity given him to withdraw his appeal, which he declined, and proceeded to argument, *held*, that such appellant, after a decision against him, would not be permitted to withdraw his

stipulation and take a new trial.
Williams v. Lindblom. 675

—When order granting temporary injunction not reviewable here.

See N. & N. B. Hosiery Co. v. Arnold. 265

—Where error in charge on criminal trial as to evidence upon one count in the indictment, which contained two counts, not rendered harmless by general verdict of guilty.

See People v. Van Zile. 368

ASSESSMENT AND TAXATION.

1. Under the provision of the Collateral Inheritance Tax Act of 1887 (§ 5, chap. 713, Laws of 1887), providing that the penalty of ten per cent imposed by the act (§ 4) in case of non-payment of the taxes prescribed within eighteen months after the death of a decedent shall not be charged, when, for reasons specified, the decedent's estate could not be settled within the eighteen months, but only six per cent from the expiration of the eighteen months, the executors of the estate of a decedent who died prior to the passage of the Repealing Act of 1892 (Chap. 399, Laws of 1892) had the right to ask that the interest to be charged for delayed payment, excused under said provisions, should be six per cent, beginning at the expiration of the eighteen months. *In re Fryerweather.* 114

2. Such a case, therefore, comes within the provision of said Repealing Act, saving from the repealing clause any "right accruing, accrued or acquired prior to May 1, 1892, under or by virtue of any law so repealed." *Id.*

3. Accordingly *held*, where a decedent died in November, 1890, and the probate of his will was contested, but the same was admitted to probate in March, 1891, and the executors of the will failed to pay a portion of the taxes imposed by the act of 1887 within eighteen months of the death, that the ten per cent penalty could not be imposed, and six per cent interest could only be charged

from and after the expiration of the eighteen months. *Id.*

4. By the will of H. she gave a fund of \$50,000 to trustees in trust to hold the same for the lives of the mother of the testatrix and of her daughter, the income to be paid to the mother for life and if the daughter survived, to her for life, the principal at the expiration of the trust to be paid to the issue of the daughter, if any living at her death, if none then to two nieces of the testatrix. The testatrix died leaving her mother, daughter and a child of the latter surviving. In proceedings before the surrogate to fix the amount of tax, under the Transfer Tax Act of 1892 (Chap. 399, Laws of 1892), it was decided that the value of the mother's life estate was less than \$10,000. *Held*, that under the provision of said act (§ 22) declaring that the words "estate" and "property," as used therein, shall "mean the property or interest therein of the testator" passing or transferred, not that "passing or transferred to individual legatees," etc., and that the word "transfer" shall "include the passing of property or interest therein in possession or enjoyment," the life estate of the mother did not come within the limitation in said act (§ 2) declaring that "such transfer of property shall not be taxable under this act unless it is personal property of the value of ten thousand dollars or more;" that the limitation applied to the aggregate value of all the property so transferred, not to the separate value of each several transfer; and so, that the mother's interest was taxable; but that the estates of the daughter and grandchild were not presently taxable, and could only be taxed when their rights became fixed and actual. *In re Hoffman* 327

5. *It seems*, that said definitions do not affect the general nature of the tax imposed by the act as heretofore determined by this court; *i. e.*, that the tax is imposed upon the right of succession to property or estates which

vest in the successors severally, and not upon the property or estate of the decedent; but they apply simply to provisions of the act, like the one fixing the limitation, where the word "property" is used by itself and to some extent ambiguously, and, therefore, needs the help of a definition. *Id.*

6. On application to the state comptroller under the statute (§§ 68, 69, 70, chap. 427, Laws of 1855) for the redemption of a tract of land containing 5,455 acres, sold for unpaid taxes, it was claimed by the appellant that one D. had been an actual occupant of part of said land during the two years subsequent to the delivery of the comptroller's deed, and no notice to redeem had been served upon him. It appeared that D. occupied a loghouse on an island in a lake included in the tract as a hunting camp at irregular intervals, and without any use of the mainland, except to roam over it in pursuit of game. *Held*, that this did not constitute actual occupancy within the meaning of the statute, and so that the application was properly denied. *People ex rel. v. Campbell.* 385

7. The application was made by one M.; the papers did not show that he had any interest in the premises. *Held*, that the provision of the act (§ 70) providing that "the occupant or any other person * * * may redeem the said land," did not permit a stranger to the title to intervene, but only included "any other person" having, or claiming in good faith to have, such substantial interest in the premises as would entitle him to redeem; and so, that the applicant was not entitled to redeem. *Id.*

ASSIGNMENT.

1. An assignment of a mortgage by an administrator of a deceased mortgagee to a third person, and by the latter to the administrator individually, is not void, but voidable at the election of the next of kin of the intestate; and so, in an action by the administrator, in his

own name as owner, to foreclose the mortgage, the mortgagor and his successors in interest may not controvert plaintiff's title. *Reed v. Knell.* 484

2. In such an action the defendants pleaded a defect of parties, in that the next of kin of the deceased mortgagee were not made parties. It appeared that the only next of kin were plaintiff and a sister who died without issue. It was claimed that she married and left a will. The alleged will was admitted to probate, but the surrogate's decree was reversed by the General Term, and the questions involved were sent to a jury for trial. At the time of the trial of the action these questions remained undisposed of, and no executor or administrator of the deceased sister had been appointed. The Special Term made no findings under the plea of defect of parties, but dismissed the complaint on the ground that the assignment of the mortgage was void. The General Term reversed the judgment and ordered a new trial without passing upon the question as to parties. Defendants appealed from the order giving the required stipulation. *Held*, that an order of affirmance and for judgment absolute on the stipulation was proper. *Id.*
3. An agreement by the vendor, upon sale of a business and its good will, that he will not engage in a similar business in the same place for a period specified, is a valuable right in connection with the business it was designed to protect, and may be assigned by the purchaser upon a sale by him of the business, and the assignee may enforce it the same as the assignor could have done had he retained the business. *Francisco v. Smith.* 488

ATTACHMENT.

- A warrant of attachment recited that defendant "has assigned and disposed of, or is about to assign or dispose of," his property with intent to defraud her creditors. *Held*, that this was not a compliance with the provision of the Code of Civil Procedure (§ 641)

which requires the warrant to "briefly recite the ground of the attachment;" that the warrant stated no ground, as to state in the alternative was to state neither the one fact nor the other; and so, it was fatally defective. *Cronin v. Crooks*. 352

ATTORNEYS.

It is the duty of the court, whenever a case is presented charging an attorney at law with dishonest conduct in his professional character, and the case is properly proved, to administer the proper punishment by removing him from his office. *In re Ryan v. Opyke*. 528

BANKS AND BANKING.

Defendant L., who, pursuant to an arrangement, had bid off at a foreclosure sale certain lands in which three infants had an interest as children and heirs at law of the deceased mortgagee, upon receipt of a deed from the widow of the mortgagor of her interest in the lands, executed a mortgage thereon to defendant O. in trust for the three children for \$1,000, payable in three installments, with interest, which mortgage was duly recorded. Subsequently L. conveyed the lands to O., who thereafter, and on February 19, 1886, executed, without consideration, and acknowledged a discharge of the mortgage, which he caused to be recorded on March 9, 1886. The first installment of the mortgage was not then due. In an action by the children to reinstate the mortgage and to foreclose the same it appeared that before the execution of the discharge, O. applied to defendant, the B. Sav. Bank, for a loan on the property, which application was granted February 1, 1886. On examination of the title an abstract by the county clerk was submitted to the bank; this contained a memorandum of the mortgage, which was described as given in trust for said minor children. Across this was written: "Discharged March 6, 1886." The bank made the loan, having no notice or knowledge of the mortgage except as given by

the abstract and the record of the mortgage. *Held*, that the acceptance by O. of the mortgage containing the declaration of trust was an acknowledgment of the trust and bound him to perform it; that the satisfaction of the mortgage was a breach of trust; that the bank was chargeable with knowledge of the trust, also that the relation of the trustee to the property had changed so that when he executed the satisfaction he was himself the owner of the land, and in satisfying the mortgage was dealing with the trust, and that he satisfied it before it became due; that there was no indication in the mortgage of authority in the trustee to accept before it became due, or to vary the trust security; that the bank was bound to inquire by what authority the trustee acted, and having failed to do so, and in the absence of proof of any affirmative power conferred upon him, it was not protected, and that plaintiffs were entitled to the relief sought. *Kirsch v. Tozier*. 390

BILLS, NOTES, CHECKS.

1. *It seems*, that the mere presence of a corporate seal upon an instrument in the form of a promissory note, executed by the corporation without any evidence that its officers intended to or did affix it, does not change the character of the instrument. *Weeks v. Zeler*. 374
2. Upon the margin of such an instrument was impressed the name of the corporation, with the words "Incorporated. Seal." There was no recital that the seal of the corporation was affixed, and in an action against the payee as indorser of the instrument, there was no evidence that the corporate seal was impressed, or that what thus appeared was the corporate seal. *Held*, that the paper could not be regarded as a sealed instrument. *Id.*
3. As to whether the presence upon such an instrument of the corporate seal would affect its negotiability, *quere*. *Id.*

4. The acceptance of a draft by the drawee is no evidence of a loan by him to the drawer. The drawee is presumably a debtor for the amount of the draft and payment of it a discharge of the debt. *Doyle v. English.* 556

5. In an action to recover an alleged loan the complaint set up part payment by delivery of certain goods and asked judgment for the balance. The answer, after a general denial, alleged a sale and delivery of goods by defendants to plaintiffs, at an agreed price, payments thereon to an amount specified, leaving a balance due, for which judgment was asked. Plaintiff, on the trial, simply produced drafts drawn by defendants upon them and his acceptance and payment thereof. No motion for a non-suit was made and the trial proceeded, the substantial controversy being as to the agreed price for the goods sold, in regard to which the evidence was conflicting, and the only claim of plaintiffs, if any, was for an over-payment. The court was requested by plaintiffs, but refused, to charge that so far as the counterclaim was concerned the burden of proof rested upon defendants. *Held*, no error; that while the charge would have been proper had plaintiffs proved the alleged loan, as they failed in this and were obliged to prove an over-payment on the contract of sale and to show this were required to prove its terms, upon this issue they, not the defendants, had the affirmative. *Id.*

BRIDGE COMPANIES.

Under the provisions of the act providing for rapid transit railways in certain cities (Chap. 4, Laws of 1891, as amended by chap. 102, Laws of 1892), which makes the authorization of the Supreme Court a prerequisite to the right of a bridge company to construct and operate an elevated railway as an approach to its bridge, in case of failure to obtain the consent of property owners, the power conferred upon the court is discretionary and exclusive, and its or-

der refusing the authorization upon the merits, where no abuse of its discretion is shown, is not reviewable here. *In re E. R. Bridge Co.* 249

BROOKLYN (CITY OF).

1. A corporation was organized under the act providing for the incorporation of water works companies (Chap. 737, Laws of 1873, amended by chap. 213, Laws of 1880) to supply the town of New Lots with water. Subsequently the town was annexed to the city of Brooklyn. By the Annexation Act (Chap. 835, Laws of 1886) the city was prohibited from supplying water to the territory included in the town until the expiration of the charter of the company or until the city should purchase or acquire its property. *Held*, that this act did not affirm or establish an exclusive right in the company to furnish water; that it did not operate upon it, but simply bore upon the power of the city, its purpose being to protect the company's franchise in case the city did not purchase the corporate property or acquire it by condemnation proceedings as authorized by the act. *In re City of Brooklyn.* 596
2. Also, *held*, that the provision of said act (§ 5) authorizing the city to acquire the property by proceedings *in invitum* was not violative of the constitutional provisions prohibiting the taking of private property except for a necessary public use, nor was it unconstitutional as authorizing the condemnation of property already devoted to a public use without designating any different or larger public use to which it was to be applied; that the public use for which it was required was sufficiently designated and was of a higher and wider scope than the use to which it was already devoted. *Id.*

BUILDING CONTRACTS.

See CONTRACTS.

BURDEN OF PROOF.

1. Plaintiff and the three defendants were the children and only heirs at law of P., who died intestate, owning a farm of 162 acres. In an action for partition defendants claimed that P. in his lifetime conveyed to plaintiff's wife fifty-nine acres, then a part of the farm, three absolutely and the remainder subject to a life estate reserved by the grantor; that such conveyance was intended by P. as an advancement and as and for plaintiff's share in his father's real estate, and was accepted by the wife, with knowledge of such intent, and that plaintiff knew and acquiesced in the conveyance for such purpose. *Held*, that parol evidence was competent to show that said deed was intended as an advancement to plaintiff; also that such an advancement could be made by the conveyance to the wife; but that it was incumbent on defendants to establish by satisfactory evidence that said conveyance was in fact made as an advancement. *Pulmer v. Culbertson*. 213
2. In an action to recover an alleged loan the complaint set up part payment by delivery of certain goods and asked judgment for the balance. The answer, after a general denial, alleged a sale and delivery of goods by defendants to plaintiffs, at an agreed price, payments thereon to an amount specified, leaving a balance due, for which judgment was asked. Plaintiff, on the trial, simply produced drafts drawn by defendants upon them and his acceptance and payment thereof. No motion for a non-suit was made and the trial proceeded, the substantial controversy being as to the agreed price for the goods sold, in regard to which the evidence was conflicting, and the only claim of plaintiffs, if any, was for an over-payment. The court was requested by plaintiffs, but refused, to charge that so far as the counter-claim was concerned the burden of proof rested upon defendants. *Held*, no error; that while the charge would have been proper had plaintiffs proved the alleged

loan, as they failed in this and were obliged to prove an over-payment on the contract of sale, and to show this were required to prove its terms, upon this issue they, not the defendants, had the affirmative. *Doyle v. English*. 556

8. Where in an action of ejectment plaintiff proves a clear legal title to the land, and defendant relies upon an equitable claim, this he is bound to establish, the same as he would had he commenced an action for equitable relief. *Dyke v. Spargur*. 651

BUSINESS CORPORATIONS.

1. A cause of action against a domestic business corporation for injuries caused by its negligence does not abate upon its dissolution, but survives, and an action thereon is maintainable against the trustees holding the corporate property for the purposes of distribution. (§ 5, chap. 691, Laws of 1892; § 80, chap. 687, Laws of 1892.) *Marsteller v. Mills*. 396
2. In regard to a business corporation engaged in carrying on its business, the mere fact that it is temporarily insolvent is not of that kind of materiality as excepts a sale of its stock by one who had knowledge of this fact, but did not disclose it to the purchaser, from the general rule of *caveat emptor*. *Rothmiller v. Stein*. 581

CALENDAR.

Where a plaintiff rightfully claims a preference on the trial calendar, and the defendant does not oppose the motion, but the same is denied by the courts, plaintiff's remedy is not by appeal but, *it seems*, by mandamus to compel the trial judge to do his duty. *Hayes v. Consolidated Gas Co. N. Y.* 641

CARRIER.

1. A common carrier is liable to an action at law for damages in case of refusal to perform its duties to

the public for a reasonable compensation. *Lough v. Outerbridge*.

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2. While a common carrier is bound to convey and deliver goods for a reasonable compensation, and may not, where the circumstances and conditions are the same, unreasonably or unjustly discriminate in favor of one against another, it may make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases for special reasons and upon special conditions. *Id.*

3. A carrier may by special agreement give reduced rates to customers who stipulate to give it all their business, and refuse those rates to others who are not able or willing to so stipulate, provided that the charge exacted from those others is not excessive or unreasonable. *Id.*

4. The Q. S. Co., defendant, was engaged in business as a common carrier transporting freight between N. Y. and certain islands, among them B. Its steamers sailed from N. Y. at intervals of about ten days. Another steamer, which was engaged in the South American trade, and sailed from N. Y. at intervals of about six weeks, took freight for B. Said company's regular rates were fifty cents per dry barrel. It and the other defendants, its agents, offered special reduced rates of twenty-five cents per dry barrel to all merchants and business men in N. Y. who would agree to ship by their line exclusively during the week said outside steamer was there engaged in obtaining freight and taking on cargo. Plaintiffs' firm, which were shipping by that steamer, demanded of defendants that they receive certain barrels of freight and transport the same from N. Y. to B. at the special rate of twenty-five cents. This defendants offered to do if said firm would agree to give their shipments for that week exclusively to their line, and also offered to carry plaintiffs' freight at all times without conditions for forty

cents. This offer the firm declined, and plaintiffs refused to receive the freight. The same rates, terms and conditions were offered to all shippers. In an action to compel defendants to receive and transport plaintiffs' freight at the special reduced rates, without conditions, the court found that the rate of forty cents was a reasonable one, and that the reduced rate of twenty-five cents was not profitable. *Held*, that the action was not maintainable; that plaintiffs were not entitled to any relief either at law or in equity; and so, that the complaint was properly dismissed. (Re-argument ordered in this case, see note, p. 682.) *Id.*

CASES REVERSED, DISTINGUISHED, ETC.

Mayor, etc., v. Twenty-third St. R. R. Co. (118 N. Y. 311), distinguished.
Mayor, etc., v. Manhattan R. Co. 22, 36

Harlem B., M. & F. R. Co. v. Town Board (76 Hun, 236), reversed.
Harlem B., M. & F. R. Co. v. Town Board Westchester. 59

Beardsley v. Cook (67 Hun, 101), reversed. *Beardsley v. Cook.* 143

Cornish v. F. B. F. Ins. Co. (74 N. Y. 295), distinguished. *Frace v. N. Y., L. E. & W. R. R. Co.* 188

Ryan v. N. Y. C. & H. R. R. Co. (35 N. Y. 210), limited. *Frace v. N. Y., L. E. & W. R. R. Co.* 189

Haffey v. Lynch (68 Hun, 507), reversed. *Haffey v. Lynch.* 241

Eldredge v. Hill (2 Johns. Ch. 281), distinguished. *Norfolk & N. B. H. Co. v. Arnold.* 270

Manicho v. Ward (27 Fed. Rep. 529), distinguished. *Lough v. Outerbridge.* 281

Brooks v. Curtis (50 N. Y. 639), distinguished. *Negus v. Becker.* 307

Schile v. Brokhahus (80 N. Y. 614), distinguished. *Negus v. Becker.* 307

- Brinkerhoff v. Bostwick* (105 N. Y. 587), distinguished. *O'Brien v. Fitzgerald.* 382
- Butler v. Manhattan R. Co.* (4 Misc. Rep. 401), reversed. *Butler v. Manhattan R. Co.* 417
- Moody v. Buck* (1 Sandf. 804), distinguished. *Williams v. Hays.* 445
- Hays v. Phoenix Ins. Co.* (25 J. & S. 99; 127 N. Y. 656), distinguished. *Williams v. Hays.* 452
- Stephens v. Perrine* (69 Hun, 578), reversed. *Stephens v. Perrine.* 476
- Karst v. Gane* (126 N. Y. 316), distinguished. *Stephens v. Perrine.* 481
- Mandeville v. Avery* (124 N. Y. 876), distinguished. *Stephens v. Perrine.* 481
- Tremaine v. Mortimer* (128 N. Y. 1), distinguished. *Stephens v. Perrine.* 482
- Wheeler v. Lawson* (108 N. Y. 40), distinguished. *Stephens v. Perrine.* 482
- Kitchen v. Lowery* (127 N. Y. 53), distinguished. *Stephens v. Perrine.* 482
- Smith v. Ferris* (70 Hun, 445), reversed. *Smith v. Ferris.* 495
- Lawrence v. Fox* (20 N. Y. 268), distinguished. *Townsend v. Rackham.* 522
- Gifford v. Corrigan* (117 N. Y. 257), distinguished. *Townsend v. Rackham.* 522
- McPherson v. Rollins* (107 N. Y. 316), distinguished. *Townsend v. Rackham.* 523
- Martin v. Funk* (75 N. Y. 134), distinguished. *Townsend v. Rackham.* 524
- Roe v. Strong* (119 N. Y. 316), distinguished. *Mission, etc., v. Cronin.* 527
- McRoberts v. Bergman* (182 N. Y. 73), distinguished. *Mission, etc., v. Cronin.* 528
- Dinan v. Coney* (67 Hun, 141), reversed. *Dinan v. Coney.* 544
- Bank of Batavia v. N. Y., L. E. & W. R. R. Co.* (106 N. Y. 195), distinguished. *Bank of New York N. B. Assn. v. A. D. & T. Co.* 563
- Titus v. Prest., etc.* (61 N. Y. 287), distinguished. *Bank of New York N. B. Assn. v. A. D. & T. Co.* 564
- Goshen Bank v. The State* (141 N. Y. 379), distinguished. *Bank of New York N. B. Assn. v. A. D. & T. Co.* 564
- Dartmouth College v. Woodward* (4 Wheat. 578), distinguished. *In re City of Brooklyn.* 611
- Milbau v. Sharp* (27 N. Y. 611), distinguished. *In re City of Brooklyn.* 616
- Mayor, etc., v. S. A. R. R. Co.* (32 N. Y. 272), distinguished. *In re City of Brooklyn.* 616
- People v. O'Brien* (111 N. Y. 1), distinguished. *In re City of Brooklyn.* 616

CAUSE OF ACTION.

1. Where an individual sustains an injury by misfeasance or non-feasance of a public officer, an action lies in favor of the former against the latter. *Beardslee v. Dolge.* 160
2. Plaintiff's complaint alleged in substance that she was the wife of defendant, who, with intent to defraud her of her dower rights in his real estate, has purchased various pieces of land, the title to which he caused to be taken in the name of L. under a written agreement with the latter that defendant "should receive all the benefit of, and have control of said property;" that defendant did exercise full possession and control of the same, and when

sold, L., pursuant to the agreement, executed conveyances to bona fide purchasers having no notice of plaintiff's interest, defendant receiving the purchase money; that all of the land so purchased except one piece had been thus sold and conveyed. Plaintiff asked for a judgment adjudging the proceeds of such sales to be "still real estate and that this plaintiff has an inchoate right of dower in the same," and that the piece un conveyed be adjudged subject to her right of dower. *Held*, that the complaint did not set forth a cause of action; and so, that the overruling of a demurrer thereto was error. *Phelps v. Phelps.* 197

3. A common carrier is liable to an action at law for damages in case of refusal to perform its duties to the public for a reasonable compensation. (Re-argument ordered in this case, see note, p. 682.) *Lough v. Outerbridge.* 271

4. Where a promise is made by one person to another for the benefit of a third, in the absence of any liability of the promisee to such third person the latter cannot enforce the promise. *Townsend v. Rackham.* 516

— Where an elevated railroad corporation has voluntarily paid a percentage of its income to a municipal corporation for the use of its streets, the former cannot recover back the sum so paid although the municipality was not entitled to the same. *See Mayor, etc., v. M. R. Co.* . 1

See CLOUD ON TITLE.
EJECTMENT.
EQUITY.
NEGLIGENCE.
SPECIFIC PERFORMANCE.

CERTIORARI.

1. A commissioner of highways, in making a return to a writ of certiorari brought to review his proceedings, acts as a ministerial officer, and where in his return he makes material false statements, an action lies against him in favor

of a party injured. *Beardles v. Dolge.* 160

2. A writ of certiorari to review the proceedings of defendant, a commissioner of highways, in locating a highway as altered, which the relator claimed was laid out through his barnyard, commanded the defendant to certify and return his proceedings "with all things pertaining thereto." In his return to the writ, defendant stated that "none of said alteration and highway proposed passes through" said barnyard. The proceedings were affirmed on the ground that the language of the return was an answer to the claim that the highway ran through said barnyard. *Held*, that the relators were not estopped by the decision, but were entitled to show, in an action to recover damages, that the highway as proposed did run through their barnyard; and so, that the return in this respect was false, and defendant acted without jurisdiction. *Id.*

CHALLENGE (OF JURORS).

Upon the trial of an indictment for murder, in advance of the selection of a jury, and before any of the panel had been examined, the parties, by permission of the court, elected to have all peremptory challenges as to jurors determined before the juror left the witness stand, and if accepted, that the final oath be at once administered. A juror was then called and sworn as to his qualification; after his examination by the prosecution, defendant's counsel asked if the juror was satisfactory to the People, to which the district attorney replied: "We do not challenge him for bias nor for favor." Said counsel then asked the court to direct that the prosecution should at once accept or reject the juror, and exercise its right of peremptory challenge then, if at all; this, the court refused. The juror was then examined by the prisoner's counsel, and, after his examination was concluded, the court called upon the district attorney

Brinkerhoff v. Bostwick (105 N. Y. 567), distinguished. *O'Brien v. Fitzgerald*.

Butler v. Manhattan R. Co. (Rep. 401), reversed. *Manhattan R. Co.*

Moody v. Buck (1 St. 383), distinguished. *Willis*.

Hays v. Phelan (99; 127 N. Y. Williams).

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THE MORTGAGE.
... to file a chattel mort-
... there is no change of
... the mortgaged prop-
... void as to then
... creditors of the mort-
... the mortgagee cannot
... acquire title to prop-
... by taking possession and
... the same under the mort-
... bidding it off on the sale,
... and this, although the mortgage
... was given in good faith to secure
... an actual indebtedness. *Stephens*
v. Perrine. 476

2. A receiver appointed in proceedings supplementary to execution may maintain an action against the mortgagor who has thus taken possession of and sold the mortgaged property, to recover the same or its value. *Id.*

3. It seems, a bona fide transfer of the property by the mortgagor to the mortgagee, in payment of the mortgage debt, before a creditor has obtained judgment and execution or any lien upon the property, will give a good title to the mortgagee and so defeat the creditor's right to assail the mortgage. *Id.*

CLERKS.

In an action brought by plaintiff against a bank to recover the amount of two certificates of deposit issued by it to him, the bank alleged that the certificates were in the hands of one R. as part of the assets of the estate of his deceased wife, and that they belonged to that estate. On the trial the certificates were produced by R. on a subpoena duces tecum, and were put in evidence by plaintiff,

from the court directed judgment on the certificates, and ordered that they be deposited with the clerk of the court, to be retained until the further order of the court, he to indorse thereon that they were in judgment against the bank. The judgment was reversed on appeal to this court (136 N. Y. 154) on the ground that plaintiff was not in a position to surrender the certificates. At the expiration of his term of office the then clerk delivered the certificates to defendant here, his successor in office. In an action of replevin, brought to recover possession of the certificates, an order was granted perpetually restraining the prosecution thereof. The title of plaintiff to the certificates was not questioned, and it was admitted that they were in defendant's custody, and that he refused to deliver them up. *Held*, that the order was erroneous; that the court below had no authority to impound the certificates and place them beyond the reach of a writ of replevin at the suit of the true owner; that the reversal of the judgment rendered any further control of the certificates by the court or its officers unnecessary, and that the direction of the trial court in the former action, that the certificates be retained by the clerk until the further order of the court, clothed the clerk with no immunity from liability in this action, as the direction was a nullity both as against R. and plaintiff. *Read v. Brayton*. 342

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COLLATERAL INHERITANCE TAX.

- Under the provisions of the Collateral Inheritance Tax Act of 1887 (§ 5, chap. 713, Laws of 1887), providing that the penalty of ten per cent imposed by the act (§ 4) in case of non-payment of the taxes prescribed within eighteen months after the death of a decedent shall not be charged, when, for reasons specified, the decedent's estate could not be settled within the eighteen months, but only six per cent from the expiration of the eighteen months, the executors of the estate of a decedent who died prior to the passage of the Repealing Act of 1892 (Chap. 399, Laws of 1892) had the right to ask that the interest to be charged for delayed payment, excused under said provisions, should be six per cent, beginning at the expiration of the eighteen months. *In re Fayerweather.* 114
- Such a case, therefore, comes within the provision of said Repealing Act, saving from the repealing clause any "right accruing, accrued or acquired prior to May 1, 1892, under or by virtue of any law so repealed." *Id.*
- Accordingly *held*, where a decedent died in November, 1890, and the probate of his will was contested, but the same was admitted to probate in March, 1891, and the executors of the will failed to pay a portion of the taxes imposed by

the act of 1887 within eighteen months of the death, that the ten per cent penalty could not be imposed, and six per cent interest could only be charged from and after the expiration of the eighteen months. *Id.*

- By the will of R., who died in 1887, his residuary estate was given to his executors in trust to pay the income thereof to his wife during her life. Upon her death said estate was given to beneficiaries named, subject to the payment of certain annuities specified, each given for the life of the annuitant. *Held*, that neither the annuities nor the remainders were presently taxable under the Collateral Inheritance Tax Act, in force at the time of the testator's death (Chap. 713, Laws of 1887); that as to the annuitants, they had no vested interest, and could take none until the death of the wife, and as to the remainders there was a contingency affecting them which rendered it impossible to ascertain their present fair and clear market value. *In re Roosevelt.* 120

COMMISSIONS.

Where by agreement between the parties, the compensation of plaintiff as salesman for defendant was to be a commission on sales, *held*, that plaintiff was entitled to commissions on orders for goods solicited and obtained by him, although the goods were not delivered by defendant until after plaintiff's discharge, and the commissions were by the agreement not payable until delivery. *Dibble v. Dimick.* 549

COMMISSIONERS OF HIGHWAYS.

- A commissioner of highways is not a judicial officer in the sense that he is entitled to the common-law protection against a civil action for misconduct in office. *Beardslee v. Dolge.* 160
- In laying out a highway said commissioners exercise a special and limited jurisdiction, and while it

to exercise his right of peremptory challenge; he interposed none, and said counsel having expressed himself satisfied, the juror was sworn. *Held*, that the ruling of the court was not error; that there was a full compliance with the provision of the Code of Criminal Procedure (§§ 385, 386) in reference to challenges. *People v. Miles.* 383

CHATTEL MORTGAGE.

1. A failure to file a chattel mortgage, where there is no change of possession of the mortgaged property, renders it void as to then existing creditors of the mortgagor, and the mortgagee cannot thereafter acquire title to property by taking possession and selling the same under the mortgage and bidding it off on the sale, and this, although the mortgage was given in good faith to secure an actual indebtedness. *Stephens v. Perrine.* 476
2. A receiver appointed in proceedings supplementary to execution may maintain an action against the mortgagor who has thus taken possession of and sold the mortgaged property, to recover the same or its value. *Id.*
3. *It seems*, a *bona fide* transfer of the property by the mortgagor to the mortgagee, in payment of the mortgage debt, before a creditor has obtained judgment and execution or any lien upon the property, will give a good title to the mortgagee and so defeat the creditor's right to assail the mortgage. *Id.*

CLERKS.

In an action brought by plaintiff against a bank to recover the amount of two certificates of deposit issued by it to him, the bank alleged that the certificates were in the hands of one R. as part of the assets of the estate of his deceased wife, and that they belonged to that estate. On the trial the certificates were produced by R. on a subpoena *duces tecum*, and were put in evidence by plaintiff,

for whom the court directed judgment on the certificates, and ordered that they be deposited with the clerk of the court, to be retained until the further order of the court, he to indorse thereon that they were in judgment against the bank. The judgment was reversed on appeal to this court (136 N. Y. 154) on the ground that plaintiff was not in a position to surrender the certificates. At the expiration of his term of office the then clerk delivered the certificates to defendant here, his successor in office. In an action of replevin, brought to recover possession of the certificates, an order was granted perpetually restraining the prosecution thereof. The title of plaintiff to the certificates was not questioned, and it was admitted that they were in defendant's custody, and that he refused to deliver them up. *Held*, that the order was erroneous; that the court below had no authority to impound the certificates and place them beyond the reach of a writ of replevin at the suit of the true owner; that the reversal of the judgment rendered any further control of the certificates by the court or its officers unnecessary, and that the direction of the trial court in the former action, that the certificates be retained by the clerk until the further order of the court, clothed the clerk with no immunity from liability in this action, as the direction was a nullity both as against R. and plaintiff. *Read v. Brayton.* 342

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COLLATERAL INHERITANCE TAX.

1. Under the provisions of the Collateral Inheritance Tax Act of 1887 (§ 5, chap. 713, Laws of 1887), providing that the penalty of ten per cent imposed by the act (§ 4) in case of non-payment of the taxes prescribed within eighteen months after the death of a decedent shall not be charged, when, for reasons specified, the decedent's estate could not be settled within the eighteen months, but only six per cent from the expiration of the eighteen months, the executors of the estate of a decedent who died prior to the passage of the Repealing Act of 1892 (Chap. 399, Laws of 1892) had the right to ask that the interest to be charged for delayed payment, excused under said provisions, should be six per cent, beginning at the expiration of the eighteen months. *In re Fayerweather.* 114
2. Such a case, therefore, comes within the provision of said Repealing Act, saving from the repealing clause any "right accruing, accrued or acquired prior to May 1, 1892, under or by virtue of any law so repealed." *Id.*
3. Accordingly *held*, where a decedent died in November, 1890, and the probate of his will was contested, but the same was admitted to probate in March, 1891, and the executors of the will failed to pay a portion of the taxes imposed by

the act of 1887 within eighteen months of the death, that the ten per cent penalty could not be imposed, and six per cent interest could only be charged from and after the expiration of the eighteen months. *Id.*

4. By the will of R., who died in 1887, his residuary estate was given to his executors in trust to pay the income thereof to his wife during her life. Upon her death said estate was given to beneficiaries named, subject to the payment of certain annuities specified, each given for the life of the annuitant. *Held*, that neither the annuities nor the remainders were presently taxable under the Collateral Inheritance Tax Act, in force at the time of the testator's death (Chap. 713, Laws of 1887); that as to the annuitants, they had no vested interest, and could take none until the death of the wife, and as to the remainders there was a contingency affecting them which rendered it impossible to ascertain their present fair and clear market value. *In re Roosevelt.* 120

COMMISSIONS.

Where by agreement between the parties, the compensation of plaintiff as salesman for defendant was to be a commission on sales, *held*, that plaintiff was entitled to commissions on orders for goods solicited and obtained by him, although the goods were not delivered by defendant until after plaintiff's discharge, and the commissions were by the agreement not payable until delivery. *Dibble v. Dimick.* 549

COMMISSIONERS OF HIGHWAYS.

1. A commissioner of highways is not a judicial officer in the sense that he is entitled to the common-law protection against a civil action for misconduct in office. *Beardslee v. Dolge.* 160
2. In laying out a highway said commissioners exercise a special and limited jurisdiction, and while it

to exercise his right of peremptory challenge; he interposed none, and said counsel having expressed himself satisfied, the juror was sworn. *Held*, that the ruling of the court was not error; that there was a full compliance with the provision of the Code of Criminal Procedure (§§ 385, 386) in reference to challenges. *People v. Miles.* 383

CHATTEL MORTGAGE.

1. A failure to file a chattel mortgage, where there is no change of possession of the mortgaged property, renders it void as to then existing creditors of the mortgagor, and the mortgagee cannot thereafter acquire title to property by taking possession and selling the same under the mortgage and bidding it off on the sale, and this, although the mortgage was given in good faith to secure an actual indebtedness. *Stephens v. Perrine.* 476
2. A receiver appointed in proceedings supplementary to execution may maintain an action against the mortgagor who has thus taken possession of and sold the mortgaged property, to recover the same or its value. *Id.*
3. *It seems*, a bona fide transfer of the property by the mortgagor to the mortgagee, in payment of the mortgage debt, before a creditor has obtained judgment and execution or any lien upon the property, will give a good title to the mortgagee and so defeat the creditor's right to assail the mortgage. *Id.*

CLERKS.

In an action brought by plaintiff against a bank to recover the amount of two certificates of deposit issued by it to him, the bank alleged that the certificates were in the hands of one R. as part of the assets of the estate of his deceased wife, and that they belonged to that estate. On the trial the certificates were produced by R. on a subpoena *duces tecum*, and were put in evidence by plaintiff,

for whom the court directed judgment on the certificates, and ordered that they be deposited with the clerk of the court, to be retained until the further order of the court, he to indorse thereon that they were in judgment against the bank. The judgment was reversed on appeal to this court (136 N. Y. 154) on the ground that plaintiff was not in a position to surrender the certificates. At the expiration of his term of office the then clerk delivered the certificates to defendant here, his successor in office. In an action of replevin, brought to recover possession of the certificates, an order was granted perpetually restraining the prosecution thereof. The title of plaintiff to the certificates was not questioned, and it was admitted that they were in defendant's custody, and that he refused to deliver them up. *Held*, that the order was erroneous; that the court below had no authority to impound the certificates and place them beyond the reach of a writ of replevin at the suit of the true owner; that the reversal of the judgment rendered any further control of the certificates by the court or its officers unnecessary, and that the direction of the trial court in the former action, that the certificates be retained by the clerk until the further order of the court, clothed the clerk with no immunity from liability in this action, as the direction was a nullity both as against R. and plaintiff. *Read v. Brayton.* 342

CODES.

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1. A commissioner of highways is not a judicial officer in the sense that he is entitled to the common-law protection against a civil action for misconduct in office. *Beardslee v. Dolge.* 160
2. In laying out a highway said commissioners exercise a special and limited jurisdiction, and while it

may be presumed, until the contrary appears, that they acted legally, their acts may be impeached by showing that they exceeded their powers. *Id.*

3. An official determination of a commissioner as to a fact upon which his power to act depends is not conclusive, and if the fact does not exist, his decision will not establish jurisdiction. *Id.*

4. A commissioner of highways, in making a return to a writ of certiorari brought to review his proceedings, acts as a ministerial officer, and where in his return he makes material false statements, an action lies against him in favor of a party injured. *Id.*

5. A writ of certiorari to review the proceedings of defendant, a commissioner of highways, in locating a highway as altered, which the relator claimed was laid out through his barnyard, commanded the defendant to certify and return his proceedings "with all things pertaining thereto." In his return to the writ, defendant stated that "none of said alteration and highway proposed passes through" said barnyard. The proceedings were affirmed on the ground that the language of the return was an answer to the claim that the highway ran through said barnyard. *Held*, that the relators were not estopped by the decision, but were entitled to show, in an action to recover damages, that the highway as proposed did run through their barnyard; and so, that the return in this respect was false, and defendant acted without jurisdiction. *Id.*

COMMON CARRIER.

See CARRIER.

COMMON SCHOOLS.

1. The provision of the New York Consolidation Act (Chap. 410, Laws of 1882) giving to the board of education "full control of the public schools and the public school system of the city, subject

only to the general statutes of the state upon education," does not give to that board power to impose a fine upon a teacher, either payable in money or by forfeiture of salary for a specified period, for violating the orders of the superintendent, or, *it seems*, for any misconduct or dereliction, in the absence of any by-law, rule or regulation known or assented to by the teacher providing for the imposition of such a fine. *People ex rel. v. Bd. Edn. N. Y.* 62

2. The provision of the Common School Act of 1856 (§ 16, chap. 179, Laws of 1856), in relation to the formation of school commissioners' districts in counties containing cities which under special acts elect superintendents of common schools, was not repealed, directly or by implication, by the act of 1864 (Chap. 555, Laws of 1864), revising and consolidating the general acts relating to public instruction. *People ex rel. v. Bd. County Canvassers Jefferson Co.* 84

3. Conceding the said provision to have been repealed, the same was re-enacted, as amended, by the act of 1883 (Chap. 414, Laws of 1883), which by its title purports to be "an act to amend" said provision. *Id.*

COMPLAINT.

See PLEADING.

COMPTROLLER.

On application to the state comptroller under the statute (§§ 68, 69, 70, chap. 427, Laws of 1855) for the redemption of a tract of land containing 5,455 acres, sold for unpaid taxes, it was claimed by the appellant that one D. had been an actual occupant of part of said land during the two years subsequent to the delivery of the comptroller's deed, and no notice to redeem had been served upon him. It appeared that D. occupied a loghouse on an island in a lake included in the tract as a hunting camp at irregular intervals, and without any use of the mainland, except to roam over it

in pursuit of game. *Held*, that this did not constitute actual occupancy with the meaning of the statute, and so that the application was properly denied. *People ex rel. v. Campbell.* 335

CONFIDENTIAL RELATION.

Where an agreement is made between parties standing in a confidential relation, or in a relation which gives to one party great influence over the other, and the agreement is to the advantage of the party in whom the confidence is reposed or whose influence is the dominant one, and to the detriment of the other party, the former will not be permitted to enforce the agreement unless it appears that he acted in the utmost good faith and that disclosure was made of all the material facts, or that the other party acted with a clear comprehension of the object and effect of the agreement. *Graham v. Graham.* 573

CONSPIRACY.

When sufficient evidence of a conspiracy has been given to make the question one for the jury, evidence of the acts and declarations of the alleged conspirators in furtherance of the common purpose is competent. *People v. McKane.* 455

CONSTITUTIONAL LAW.

1. The act of 1868 (Chap. 855, Laws of 1868) entitled "An act supplementary to chapter 489, Laws of 1867, and to provide for the collection and application of revenue in the county of New York in certain cases," is invalid as it is violative of the provision of the Constitution (Art. 3, § 16) requiring that a private or local bill shall embrace but one subject which shall be expressed in its title. *Mayor, etc., v. Manhattan R. Co.* 1

2. The different parts of said act are so interwoven and dependent one upon the other, that no portion thereof can be upheld after striking out the balance. *Id.*

3. Although said constitutional provision is of a public nature, where an act violative thereof is passed, bearing upon the private rights of individuals or corporations, the constitutional provision becomes as to them one enacted for their benefit, and they may waive the benefit thereof and consent to perform or submit to the requirements of the act, and when once such waiver has been made and consent so given, and the party waiving and consenting has taken benefits granted by the act, such party is forever concluded thereby. *Id.*

4. The legislature has power to authorize a foreign railroad corporation, lawfully operating its road within this state, to acquire by condemnation additional lands required for railroad purposes. *N. Y., N. H. & H. R. R. Co. v. Welsh.* 411

5. A corporation was organized under the act providing for the incorporation of water works companies (Chap. 737, Laws of 1873, amended by chap. 218, Laws of 1881) to supply the town of New Lots with water. Subsequently the town was annexed to the city of Brooklyn. *Held*, that the provisions of the Annexation Act (Chap. 335, Laws of 1886, § 5) authorizing the city to acquire the property by proceedings *in invitum* was not violative of the constitutional provisions prohibiting the taking of private property except for a necessary public use, nor was it unconstitutional as authorizing the condemnation of property already devoted to a public use without designating any different or larger public use to which it was to be applied; that the public use for which it was required was sufficiently designated and was of a higher and wider scope than the use to which it was already devoted. *In re City of Brooklyn.* 596

CONSTRUCTION.

1. The stipulations of a fire insurance policy which relate to the procedure merely in case of loss are to be reasonably, not rigidly,

construed. *Paltrovitch v. Phœnix Ins. Co.* 78

2. When a contract contains provisions somewhat inconsistent, that construction will be adopted which, while giving some effect to all, will plainly tend to carry out the clear purpose of the agreement. *Eddy v. London Assurance Corp.* 811

CONTEMPT.

1. The provision of the Code of Criminal Procedure (§ 515) abolishing writs of error and certiorari and enacting that judgments and orders in criminal cases and orders in "special proceedings of a criminal nature" may be reviewed only by appeal, does not include proceedings to punish for a criminal contempt. The "special proceedings of a criminal nature" referred to are those designated as such in said Code. *People ex rel. v. Forbes.* 219

2. An order, therefore, made in proceedings to punish for a criminal contempt may be reviewed by certiorari. *Id.*

3. The constitutional and statutory provisions (U. S. Const. art. 5; State Const. art. 1, § 6; Code Civ. Pro. § 887; Code Crim. Pro. § 10), declaring that no person shall be compelled to testify against himself in any criminal case, protects a person called as a witness in any judicial or other proceeding against himself, or upon the trial of issues between others, from being compelled to disclose facts or circumstances that can be used against him as admissions tending to prove his connection with any criminal offense of which he may then or thereafter be charged, or the sources from or the means by which evidence of its commission or of his connection with it may be obtained. Nothing short of absolute immunity from prosecution can take the place of the privilege so given. *Id.*

4. The witness is himself in such a case the judge as to the effect of answers sought to be drawn from

him, and if to his mind it may constitute a link in the chain of evidence sufficient to convict him or put him in jeopardy, if other facts are shown, he may remain silent, unless it be perfectly clear that he is mistaken and that the answer cannot possibly injure him, or tend in any way to subject him to the peril of prosecution. *Id.*

5. While the students belonging to one of the classes of C. University were holding a banquet, a poisonous gas was injected by some persons, presumed to be other students, into the dining hall and adjoining kitchen, which caused the death of one person and seriously affected many others. The grand jury instituted an inquiry to ascertain who were the guilty persons, and the relator was subpoenaed before it as a witness. After he had testified that he had no connection whatever with the transaction, he stated that he and his room mate had taken a course in chemistry, and were familiar with the methods of generating the gas used. Various questions were then asked him for the purpose of ascertaining who placed the jugs, in which the gas was generated, in the room under the dining hall, among others, if he knew where the jugs were purchased, who purchased them, when purchased and to whom delivered after they were purchased. These questions he declined to answer on the ground that they would tend to criminate him. It appeared that the relator boarded in the house from whence the jugs were taken and his room mate was one of the persons suspected. In proceedings to punish for contempt in refusing to answer said questions, *held*, that the case came within the said constitutional and statutory provisions; that the relator did not waive his right by testifying that he had no connection with the transaction; and so, that an order adjudging the relator guilty of contempt in refusing to answer was error. *Id.*

— *When judgment debtor properly adjudged in contempt for failure to produce books pursuant to a sub-*

pana duces tecum in supplementary proceedings.

See In re Holly Man. Co. v. Verner (Mem.). 639

CONTRACTS.

1. H., the owner of a lot adjoining that of plaintiffs, entered into a contract with defendants by which they agreed to build a house upon said lot and "to become answerable and accountable for any damages * * * to the property * * * of any neighbor * * * during the performance of said work." Defendants entered into a contract with D., by which the latter agreed to do the necessary excavation, he assuming "all responsibility for any loss or damage to persons or property" while engaged in the work, and to save defendants harmless therefrom. In blasting rock upon said lot, while D. was engaged in the performance of his contract, plaintiff's house was injured. In an action to recover damages the evidence tended to show that the damage was caused by the negligent manner in which D. conducted the work of blasting. The trial court charged the jury that in any event the defendants were liable. *Held*, error; that defendants were not liable for negligence on the part of D.; that if there was no negligence, and the injury was the inevitable result of the blasting, no one was liable, and if defendants' contract with H. was to be treated as a contract of indemnity, it imposed no liability, as H. was not liable; that the clause referred to could not be considered as inserted for plaintiff's benefit, but even if so held, as she was not a party to the contract or in privity therewith, as to her it was without consideration and she could not enforce it. *French v. Vir.* 90

2. Defendant and D. & F. entered into a contract by which the latter agreed to furnish all the material and labor required in the erection of two houses for the former; the agreed compensation to be paid in instalments, the last instalment to be paid when the work was

completed. Plaintiff contracted with D. & F. to furnish a portion of the material required. After said parties had entered upon the performance of their respective contracts, D. & F. gave to plaintiff a written order requesting defendant to retain and pay to plaintiff from the last payment to be made to them under their contract with defendant, the sum of \$1,175. This order defendant accepted. In an action to recover the amount thereof it appeared that D. & F. failed to perform their contract. *Held*, that defendant's acceptance contemplated a performance of their contract by D. & F. so as to entitle them to the last payment, and defendant's obligation to plaintiff was that in case of such performance he would retain from such payment sufficient to pay plaintiff the amount specified. *Beardaley v. Cook.* 148

3. By the terms of the contract the payments were to be made upon certificate of the architect of performance. It also contained a provision that in case D. & F. failed to perform, defendant might complete the work and deduct the expense of completion from any balance unpaid upon the contract. Defendant did complete the houses under this provision, but the amount expended by him in so doing was not found, the trial court refusing to make a finding on that subject, it holding that the builders had performed. *Held*, that defendant, when he elected to complete the contract instead of insisting upon performance by the builders, became liable to pay to plaintiff any part of the last payment which remained in his hands after deducting the expenses of completion; that the architect's certificate was not necessary, and that as to such remainder the acceptance of the order operated as an equitable assignment thereof, which could not be affected by payments to the builders in advance of the work or a mechanic's lien subsequently filed; but that plaintiff was bound to show an amount still remaining in defendant's hands over and above what he had expended, which was applicable to the payment of the or-

der, and in the absence of such proof was not entitled to recover.

Id.

4. The parties entered into a contract by which plaintiff agreed to supervise and build a house for defendant, to contract for the work and charge everything at the exact cost, for which he was to furnish vouchers. In an action to recover a balance alleged to be due for moneys paid out by plaintiff for work and materials, it appeared that plaintiff rendered a statement to defendant of moneys expended, accompanied by the vouchers therefor, and upon the trial he proved the expenditure of all the moneys claimed. *Held*, that the evidence was sufficient to sustain a recovery; that plaintiff acted as agent for defendant, and as such was bound simply to act in good faith and in the usual way in making expenditures; that it was not necessary for him to show that all the materials charged were actually used in the building, but the vouchers were sufficient *prima facie* evidence, and as to the labor, it was sufficient for him to show, as was shown, that he employed men upon the building under foremen who kept their time, and that he made payments according to the time thus kept. *Blazo v. Gill.* 282

5. In an action for a breach of contract the damages recoverable are those which the parties may fairly be supposed when they made the contract to have contemplated as naturally following its violation. *U. S. Trust Co. v. O'Brien.* 284

6. The inquiry is, what is an adequate indemnity to the party injured, and while damages which are "uncertain, speculative and contingent" are not recoverable, plaintiff is not bound to show to a certainty which excludes the possibility of a doubt, that the loss claimed resulted from defendant's violation of the contract. Reasonable certainty, founded upon inferences legitimately and properly deducible from the evidence that the loss resulted from the breach and was the natural

and proximate result thereof, is all that is required. *Id.*

7. When a contract contains provisions somewhat inconsistent that construction will be adopted which, while giving some effect to all, will plainly tend to carry out the clear purpose of the agreement. *Eddy v. London Assurance Corp.* 311

8. A seal unnecessarily affixed to a contract for the sale of personal property cannot affect the rights of the parties, and every defense is open to either which would exist had the writing not been sealed. *Bridger v. Goldsmith.* 424

9. A mere device of one party to a contract intended to shield him from the results of his own fraud practiced upon the other party cannot be the basis of an equitable estoppel. *Id.*

10. So, also, where one party to a contract has perpetrated a fraud upon the other by means of which the latter was induced to enter into the contract, he cannot be precluded from seeking redress by a provision in the contract purporting to grant to the former immunity against the consequences of any fraud. *Id.*

11. Defendant sold to plaintiff his business, the fixtures and other property in his store. The contract of sale was in writing, under seal and contained a clause to the effect that it was understood and agreed that defendant had made no statements or representations for the purpose of inducing the sale, other than that he had been engaged in the business since 1867. In an action to set aside the sale and recover the consideration paid on the ground that plaintiff was induced to purchase by false and fraudulent representations as to the character of the property, the extent of the business and the income derived therefrom, it appeared that after the negotiations had been completed and the agreement drawn, the clause specified was inserted at the request of defendant. *Held*, that the provision was not a covenant but

simply a statement in the nature of a certificate as to a fact; and that plaintiff was not precluded thereby from showing the fraud and obtaining relief therefrom.

Id.

12. *It seems*, where the business of a private corporation or an individual is threatened with competition, a contract with the competitor that he shall abandon his enterprise and take employment at an agreed compensation, with such corporation or individual, is not against public policy. *Oakes v. Cattaraugus Water Co.* 480

13. C., who was engaged in organizing a water works company, and was the principal promoter of the enterprise, in the name of the proposed corporation entered into a contract with plaintiff, agreeing to pay him \$1,000 for his services "for securing right of way, hydrant rental, placing investments, and in all things pertaining to the building of water works." The company was thereafter incorporated; C., his wife and brother became respectively president, secretary and treasurer thereof; C. was its general managing agent and had full direction and charge of its business. The water works were constructed, and plaintiff, at the request of C., rendered services of the character called for by the contract. In an action against the corporation on the contract it appeared that, after the completion of the works, C. acknowledged the indebtedness to plaintiff and promised to pay it. *Held* (FINCH and GRAY, JJ., dissenting), that while the contract, having been made before defendant had a corporate existence, was not, at the inception thereof, its contract or binding upon it, yet it was of such character that C. had the power to make or ratify it on behalf of the corporation when it attained a legal existence; that if C. intended, by calling upon plaintiff to do the things agreed to in the writing, to adopt and ratify the agreement on behalf of the defendant, and if plaintiff intended to and did perform for the corporation, it became bound; that these

were, under the circumstances, questions of fact for the jury; and so, that an order dismissing the complaint on trial was error. *Id.*

14. Evidence was given on the trial tending to show that plaintiff, before contracting with C., contemplated the formation of a similar corporation himself, and that one purpose of the agreement was to compensate him for consenting to abandon the enterprise. No such consideration was stated in the agreement. *Held*, that the court was not warranted in holding, as matter of law, that the purpose of the contract was forbidden by public policy, or that it was made for purposes other than that stated upon its face. *Id.*

15. An agreement by the vendor, upon sale of a business and its good will, that he will not engage in a similar business in the same place for a period specified, is legal and valid and will be enforced by a court of equity. *Francisco v. Smith.* 488

16. Such an agreement is a valuable right in connection with the business it was designed to protect, and may be assigned by the purchaser upon a sale by him of the business, and the assignee may enforce it the same as the assignor could have done had he retained the business. *Id.*

17. Where by agreement between the parties, the compensation of plaintiff as salesman for defendant was to be a commission on sales, *held*, that plaintiff was entitled to commissions on orders for goods solicited and obtained by him, although the goods were not delivered by defendant until after plaintiff's discharge, and the commissions were by the agreement not payable until delivery. *Dibble v. Dinmick.* 549

18. Where an agreement is made between parties standing in a confidential relation, or in a relation which gives to one party great influence over the other, and the agreement is to the advantage of the party in which the confidence

is reposed or whose influence is the dominant one, and to the detriment of the other party, the former will not be permitted to enforce the agreement unless it appears that he acted in the utmost good faith and that disclosure was made of all the material facts, or that the other party acted with a clear comprehension of the object and effect of the agreement. *Graham v. Graham.* 573

19. This rule applies in favor of a wife in respect to an ante-nuptial contract, and the courts will regard with rigid scrutiny such a contract where it deprives her of any prospective interest in the estate of her intended husband, and especially where no provision is made therein for her support in case she survives him. *Id.*

20. In an action by the wife to set aside an ante-nuptial agreement, by the terms of which she surrendered all claim to dower, it appeared indisputably that defendant at the time the agreement was made owned real estate of the value of \$100,000; that the relinquishment of dower was not a condition of the engagement of marriage; that there was no negotiation between the parties on that subject before they met and executed the agreement; that defendant then stated that he wanted it arranged so that he could buy and sell real estate without interference from her, but did not disclose to her that this would mean a relinquishment of her dower right; that no consideration was paid for the surrender, and that she acted without the aid of counsel. *Held*, that the General Term properly reversed on the facts a judgment of Special Term in favor of defendant; and that plaintiff was entitled to the relief sought. *Id.*

21. The franchise conferred upon a corporation organized under the act providing for the incorporation of water works companies (Chap. 737, Laws of 1873, amended by chap. 218, Laws of 1881) is not exclusive in its nature; it does not give to the company the exclusive and permanent right, during the

term of the corporate charter, to purvey water to the town or village to supply which it was created, and neither the statute nor the constitutional provision prohibiting legislation impairing the obligation of contracts precludes the grant of a charter to another company, that has obtained the requisite assent of the municipal authorities, authorizing it to supply water from other sources to the inhabitants of the same town or village. *In re City of Brooklyn.* 596

22. So, also, where a corporation organized under said act entered into a contract with the town for supplying it with water for a term of years, *held*, that in the absence of an express provision in the contract prohibiting it from so doing, the town was not precluded from making a like grant to or contract with another company for another or further supply, if the public needs required it. *Id.*

23. A provision in a building contract that the contractor will "do" a certain amount of "brick work" may mean simply the work of laying the brick, or it may include the furnishing as well as laying them, and parol evidence is competent in such case to show the sense in which the parties used the words. *Strepone v. Lennon.* 626

24. By the terms of a contract between plaintiff and defendants T. N. M. and D. M., said defendants procured from defendant the C. N. Bank a certificate of deposit for \$5,000, a sum agreed upon as liquidated damages in case of non-performance on their part. The certificate was delivered to defendant F. to be delivered up by him on the joint order of plaintiff and T. N. M. In an action to recover the amount, it appeared that T. N. M. and D. M. wrongfully refused to carry out their contract, and that the former refused to sign a written order for the delivery of the draft to plaintiff. *Held*, that the proper form of judgment was a direction requiring the delivery of

such an order; that upon receipt thereof, F. deliver the certificate to plaintiff, and that the bank, upon presentation and delivery thereof indorsed by plaintiff, pay to him the \$5,000; also, that T. N. M. and D. M. should be adjudged to pay interest on the amount from the time demand was made upon T. N. M. for the order and the costs of the action. *Pellas v. Motley.* 657

— If a mistake was made in drafting a contract, or it is ambiguous or indefinite, or does not express the intent of all the parties, it is the duty of the trial court in an action upon the contract tried by the court to find the facts; if the ambiguity can be solved, or an omission to express what the parties had in mind can be supplied by oral proof, then the particular fact established should be found, and in the absence of such a finding this court may not resort to the evidence to spell out what the parties intended to embody in the instrument.

See Camp v. Treanor (Mem.) 649

See CARRIER.
GUARANTY.
INSURANCE (FIRE).
INSURANCE (MARINE).
LEASE.
SALES.
SPECIFIC PERFORMANCE.

CORPORATIONS.

1. A corporation as well as an individual may waive a constitutional or statutory provision in its favor or for its protection where it is exclusively a matter of private right and no consideration of public morals is involved, and having once done so it cannot subsequently invoke the protection of the provision. *Mayor, etc., v. Manhattan R. Co.* 1
2. The court has no power, in a proceeding under the Code of Civil Procedure for the voluntary dissolution of a corporation, to restrain creditors of the corporation from disposing of its bonds, held as collateral to loans under lawful contracts, empowering them to sell. *In re Binghamton G. E. Co.* 261

3. The proceeding is purely statutory and the restraining power of the court is such as is given by the Code of Civil Procedure (§ 2423). The equity power of the court does not extend to the sequestration of the property of a corporation by means of a receiver. *Id.*

4. Where, therefore, an order in such a proceeding appointing a temporary receiver, contained a clause restraining creditors of the corporation from foreclosing or selling its bonds pledged as collateral, held, that the order was properly modified on motion of a creditor who had prior to the institution of the proceeding received bonds of the corporation as collateral security for money loaned, so as not to restrain or prohibit said creditor from foreclosing or selling said bonds, as authorized by the contract under which the bonds were held. *Id.*

5. Where a stockholder brings an action against his corporation and fails, the payment by him of the judgment for costs puts him in the same relations to the corporation that he had occupied before, and the directors may not resist an application for the transfer of his stock by setting up a claim that by reason of the suit the corporation was obliged to pay counsel fees and expenses in the litigation which were not covered by the taxable costs. *Cassagne v. Marrin.* 292

6. It seems, that the mere presence of a corporate seal upon an instrument in the form of a promissory note, executed by the corporation without any evidence that its officers intended to or did affix it, does not change the character of the instrument. *Weeks v. Esler.* 374

7. Upon the corner of such an instrument was impressed the name of the corporation, with the words "Incorporated. Seal." There was no recital that the seal of the corporation was affixed, and in an action against the payee as indorser of the instrument, there

was no evidence that the corporate seal was impressed, or that what thus appeared was the corporate seal. *Held*, that the paper could not be regarded as a sealed instrument. *Id.*

8. As to whether the presence upon such an instrument of the corporate seal would affect its negotiability, *quære*. *Id.*

9. The complaint in an action brought by receivers of a corporation alleged that each of the defendants had been a director of the corporation during a period stated. This showed that they had not all been directors for the same length of time or during the same period. The complaint then set forth various acts of negligence and wrong doing on the part of the defendants, as directors, resulting in large losses to the corporation. A money judgment was asked against the defendants jointly for the full amount of loss claimed. There was no averment that an accounting was necessary to ascertain the damages, nor was it asserted that defendants were severally liable for separate and personal misconduct. On demurrer based upon the ground that different causes of action affecting different defendants had been improperly joined, *held*, that the action was to be regarded as one at law; and so, that the demurrer was well taken. *O'Brien v. Fitzgerald*. 377

10. Within the meaning of the provision of the "General Corporation Law" (Chap. 687, Laws of 1892), which provides that, upon the dissolution of a corporation, its directors or managers shall, unless other persons are appointed, be the trustees of the "creditors and stockholders," the word "creditors" includes all those to whom the corporation was under any enforceable obligation at the time of its dissolution, as well as those to whom it was indebted. *Marsteller v. Mills*. 398

11. Where the president of a private corporation has full personal charge of its business, he repre-

sents the corporation, and *prima facie* has power to do any act which its directors could authorize or ratify. *Oakes v. Cattaraugus Water Co.* 430

12. *It seems*, where the business of a private corporation or an individual is threatened with competition, a contract with the competitor that he shall abandon his enterprise and take employment at an agreed compensation, with such corporation or individual, is not against public policy. *Id.*

13. C., who was engaged in organizing a water works company, and was the principal promoter of the enterprise, in the name of the proposed corporation entered into a contract with plaintiff, agreeing to pay him \$1,000 for his services "for securing right of way, hydrant rental, placing investments, and in all things pertaining to the building of water works." The company was thereafter incorporated; C., his wife and brother became respectively president, secretary and treasurer thereof; C. was its general managing agent and had full direction and charge of its business. The water works were constructed, and plaintiff, at the request of C., rendered services of the character called for by the contract. In an action against the corporation on the contract it appeared that, after the completion of the works, C. acknowledged the indebtedness to plaintiff and promised to pay it. *Held* (FRICH and GRAY, JJ., dissenting), that while the contract, having been made before defendant had a corporate existence, was not, at the inception thereof, its contract or binding upon it, yet it was of such character that C. had the power to make or ratify it on behalf of the corporation when it attained a legal existence; that if C. intended, by calling upon plaintiff to do the things agreed to in the writing, to adopt and ratify the agreement on behalf of the defendant, and if plaintiff intended to and did perform for the corporation, it became bound; that these were, under the circumstances, questions of fact for the jury; and so, that an order dis-

missing the complaint on trial was error. *Id.*

14. Evidence was given on the trial tending to show that plaintiff, before contracting with C., contemplated the formation of a similar corporation himself, and that one purpose of the agreement was to compensate him for consenting to abandon the enterprise. No such consideration was stated in the agreement. *Held*, that the court was not warranted in holding, as matter of law, that the purpose of the contract was forbidden by public policy, or that it was made for purposes other than that stated upon its face. *Id.*

15. Defendant, a corporation authorized by its charter to receive goods for storage and issue warehouse receipts, which were made negotiable, by a by-law directed the warehouse receipts to be signed by its president or secretary. S., its president, applied to plaintiff for and obtained a personal loan, giving therefor his own note and as collateral security a warehouse receipt purporting to be issued by defendant, signed by him as president, acknowledging the receipt on storage for account of himself and subject to his order of a quantity of cotton. Plaintiff's officers knew when the loan was made that the person to whom it was made was defendant's president, and that the loan was a personal one. The loan was made on the faith of the collateral. S., in fact, had deposited no cotton with defendant. The note was not paid at maturity, and defendant, on demand made, refused to deliver the cotton or pay its value. In an action to recover damages, *held*, that the by-law did not clothe the president with authority to issue receipts to himself for cotton which in truth had been deposited by him; and so, that defendant was not estopped from denying the delivery of the cotton, and was not liable. *Bank N. Y. Bkg. Assn. v. Am. D. & T. Co.* 559

16. It seems, that if the by-law had given the president general authority to issue receipts to himself for cotton actually deposited, defend-

ant would have been liable to a *bona fide* holder for value of such a receipt, although the president had not in fact deposited any cotton. *Id.*

17. While the legislature may not destroy or confiscate the property and franchises of a corporation, it cannot be restricted in its grants of corporate franchises which are within constitutional limitations, save by its own express agreement, even though the consequences of such a grant may be to entail loss, if not ruin, upon existing corporations through rivalry and competition. *In re City of Brooklyn.* 596

18. Where, after the commencement of an action by a corporation to recover an indebtedness, it becomes insolvent and a receiver of its assets is appointed, this does not affect the right of action; this may still be asserted by it and the action continued by the receiver without any substitution, so long as there is no dissolution of the corporation by judgment of the court. *U. S. Vinegar Co. v. Spamer.* 676

See BRIDGE COMPANIES.
BUSINESS CORPORATIONS.
INSURANCE (FIRE).
INSURANCE (MARINE).
MANUFACTURING CORPORATIONS.
MUNICIPAL CORPORATIONS.
RAILROAD CORPORATIONS.
STOCKHOLDERS.
TELEGRAPH COMPANIES.
WATER WORKS COMPANIES.

COSTS.

1. The parties hereto stipulated that the action be discontinued upon terms specified, the order of discontinuance to be without prejudice to a motion for extra allowance, and if allowance be granted and not paid, that defendants could move to vacate the order of discontinuance *ex parte*. Upon this stipulation an order of discontinuance was entered which recited that plaintiff had complied with all terms "except to the extra allowance to be hereafter

disposed of." An order of Special Term granting an extra allowance was reversed by the General Term without considering the merits, on the ground, as appears by its order, that the court had no power after discontinuance to grant an extra allowance. *Held*, error; that the parties had power to enter into the stipulation and pursuant to it the motion for extra allowance was regular, and the General Term had power to review on the merits the order granting it. *H. B. M. & F. R. Co. v. Town Bd. Westchester.* 59

2. The complaint in an equity action was dismissed on trial. On appeal the judgment was reversed. The order of General Term was affirmed on appeal to this court, and upon defendants' stipulation judgment absolute was ordered for plaintiff, with costs (140 N. Y. 250). *Held*, that upon filing the remittitur, the Special Term had power to award costs and an extra allowance; that while under the order of affirmance the costs awarded were the costs in this court only, as the case was one where the costs and an extra allowance were in the discretion of the court below, it was proper for the court to award them in ordering final judgment. *Barnard v. Hall.* 339

COUNTERCLAIM.

See PLEADING.

COURTS.

See COURT OF COMMON PLEAS.
SUPERIOR CITY COURTS.

COURT OF COMMON PLEAS.

An action was brought in the Court of Common Pleas in and for the city and county of New York to remove two trustees of a trust created under a will, one of whom is and was at the commencement of the action and during the time mentioned in the complaint a resident of Massachusetts, and none of the acts complained of were

done in this state. One of the plaintiffs, also a trustee, resides in the city of New York; the other plaintiff, a *cestui que trust*, resides in England. An order was made for the service of the summons on said non-resident trustee by publication. On motion to vacate the order, *held*, that said court had no jurisdiction, and so, that a denial of the motion was error. *Paget v. Stevens.* 172

CRIMES.

1. The provision of the Penal Code (§ 29) which declares that "a person who, directly or indirectly, counsels, commands, induces or procures another to commit a crime is a principal," applies to the provision of said Code (§ 41c) declaring that any member of a registry board who willfully violates any provision of the Election Law relative to the registration of electors shall be punishable by imprisonment, etc. *People v. McKane.* 455
2. A person, therefore, who, although not a member of a board of registry, induces or procures its members to willfully violate a provision of the Election Law (Chap. 680, Laws of 1892) in relation to the registration of voters, is guilty of a crime and may be indicted as a principal jointly with the members of the board.

CRIMINAL TRIAL.

1. Upon trial of an indictment charging the presentation to a fire insurance company of a false and fraudulent claim for alleged loss by fire of property insured, defendant's books of account, which had been seized and brought into court, were introduced in evidence. No objection was made on the part of defendant on the ground that the books were produced against his will. *Held*, that there was no compulsion within the meaning of the constitutional provision declaring that no person in a criminal action shall be compelled to testify against himself, and that in the absence of such an objection the

books were competent evidence, and this, although their production and use could be said to have been proof of defendant's own confession or admission, instead of a part of the *res gestæ* of the crime. *People v. Spiegel*. 107

2. Under the provision of the Penal Code (§ 22) declaring that "when-ever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive or intent with which he committed the act," where it appears upon the trial of an indictment for murder in the first degree that the defendant was intoxicated when he committed the homicide, the jury should be instructed that if the intoxication had extended so far in its effects that the necessary intent, deliberation and premeditation were absent, the fact of intoxication must be considered, and a verdict rendered in accordance therewith. In such a case the intoxication need not be to the extent of depriving the accused of all power of volition or of all ability to form an intent. *People v. Leonardi*. 360

3. Upon the trial of an indictment for murder it appeared that the homicide was committed by defendant without provocation and without motive, and that he was very much intoxicated at the time. The court charged in substance that if defendant had intelligence enough to know right from wrong, that the act he committed was wrong, he was responsible; but if he was bereft of reason, sense and judgment, and acted without knowledge or intent as to the result of his acts, he was irresponsible, and that this was all the court would say as to the intoxication of defendant bearing upon his capacity to distinguish between right and wrong, but that it would speak thereafter upon the subject of intoxication as bearing upon the question of motive. Subsequently the court

charged that if defendant was sober enough to know what he was about, that the act was wrong, then his intoxication and motive would both exist, and the one would not destroy the other; that he must be so completely intoxicated in order to be excused as to be destitute of the capacity to realize the wrongful nature of the act, that his acts were wholly aimless and without purpose. *Held*, error. *Id.*

4. Suspicion cannot give probative force to testimony in a criminal action which is, in itself, insufficient to establish or justify an inference of a particular fact, and proof of one offense cannot aid in establishing another, which other is not only not proved, but as to which there is no affirmative evidence from which a legal inference of its commission can be drawn. *People v. Van Zile*. 368
5. An indictment for abortion contained two counts — one charging the commission of the offense by the use of instruments — the other by administering a medicine or drug. The only evidence under the first count, so far as defendant was concerned, was his own testimony, which was to the effect that at a time specified he made an examination to determine whether the woman was pregnant, and after he had stated what occurred, which, if true, showed that no criminal operation was performed, he denied the use of any instrument which would have that effect. Defendant's counsel requested the court to charge that there was no evidence as to what occurred at the time stated, except defendant's testimony, and this utterly disproved that any criminal operation was performed or attempted at that time. The court refused to charge other than that there was no direct evidence of what took place, except that of defendant, and as to that the jury were not compelled to accept all of it, but might believe such as they credited and reject such as they discredited. Said counsel then requested the court to charge that there was "no evidence to justify a finding that any criminal opera-

tion was performed or attempted" by defendant on that occasion. This the court refused. *Held*, error. *Id.*

6. Evidence was given on the part of the prosecution tending to support the second count in the indictment. The case was submitted on both counts and a general verdict of guilty rendered. *Held*, that this did not render the error harmless, as defendant may have been prejudiced in respect to the charge in the second count by the ruling. *Id.*

7. Upon the trial of an indictment for murder, in advance of the selection of a jury, and before any of the panel had been examined, the parties, by permission of the court, elected to have all peremptory challenges as to jurors determined before the juror left the witness stand, and, if accepted, that the final oath be at once administered. A juror was then called and sworn as to his qualification; after his examination by the prosecution, defendant's counsel asked if the juror was satisfactory to the People, to which the district attorney replied: "We do not challenge him for bias nor for favor." Said counsel then asked the court to direct that the prosecution should at once accept or reject the juror, and exercise its right of peremptory challenge then, if at all; this the court refused. The juror was then examined by the prisoner's counsel, and, after his examination was concluded, the court called upon the district attorney to exercise his right of peremptory challenge; he interposed none, and said counsel having expressed himself satisfied, the juror was sworn. *Held*, that the ruling of the court was not error; that there was a full compliance with the provision of the Code of Criminal Procedure (§§ 885, 886) in reference to challenges. *People v. Miles.* 388

8. One of the defenses interposed was insanity; after evidence had been given on the part of the defense as to the words and actions of defendant on an occasion specified, which it was claimed were

so strange and inexplicable as to indicate insanity, the prosecution was allowed to show that on that occasion defendant was intoxicated. *Held*, no error. *Id.*

9. Defendant was indicted jointly with inspectors of election constituting a board of registry for a willful violation of the provision of the Election Law (§ 33, chap. 680, Laws of 1892), which directs the inspectors to make three copies of the register of voters, and requires that the register and copies "shall at all reasonable hours be accessible to the public for examination or for making copies thereof." Defendant was not a member of the board of registry, but was charged with willfully and feloniously procuring, by his aid, counsel, command and assistance, the inspectors to conceal the lists and to refuse the public access thereto. Defendant was tried separately; upon the trial no direct evidence was given that he committed or advised the inspectors to conceal the registry lists, but the prosecution attempted to show a criminal conspiracy on the part of defendant and other public officials of the town for the purpose of casting a large fraudulent vote, and a concealment of the lists as a necessary part of the scheme. No conspiracy was charged in the indictment. *Held*, unnecessary, as the conspiracy, if shown, was evidence in support of the charge made. *People v. McKane.* 455

10. When sufficient evidence of a conspiracy has been given to make the question one for the jury, evidence of the acts and declarations of the alleged conspirators in furtherance of the common purpose is competent. *Id.*

11. These facts appeared on the trial: The town board of the town of G., of which board defendant, as supervisor, was the presiding officer, divided the town into six election districts. These were so arranged that all of them converged in the town hall, in which building the registry lists were prepared and the vote cast for the

entire town. The inspectors in all the districts concealed the registry lists and willfully neglected and refused to give the public access to them, and the evidence tended to show that they were all acting in furtherance of a common plan. G., a candidate for an office to be voted for at the election, instituted judicial proceedings to compel the performance of their duty by the inspectors. Defendant employed counsel to resist these proceedings, and made an affidavit, to be used therein, in which he stated, among other things, that he had examined the lists and that they contained no fraudulent names. Defendant was chief of police, and as such and as chairman of the town board, had charge and control of the town hall. G. sent a large body of men to the town hall to obtain access to the lists and make copies thereof; they were all driven from the hall, some beaten and some arrested and imprisoned. Another body of G.'s supporters, who went to the town hall on election day for the purpose of watching the proceedings, were treated in a similar manner. Many were arrested without cause. Defendant was the leader in all these proceedings. The registry lists contained a great number of names of persons not legal voters and not residents of the town, and the vote at the election, as reported and certified by the canvassers, was much larger than the number of actual voters. Defendant had been supervisor for eight successive terms, and during that time the vote of the town was nearly unanimous in favor of the candidates he supported, which were sometimes of one political party, sometimes of another. *Held*, that the evidence was sufficient to sustain the indictment. *Id.*

DAMAGES.

1. In an action for a breach of contract the damages recoverable are those which the parties may fairly be supposed when they made the contract to have contemplated as naturally following its violation. *U S. Trust Co. v. O'Brien*. 284

2. The inquiry is, what is an adequate indemnity to the party injured, and while damages which are "uncertain, speculative and contingent" are not recoverable, plaintiff is not bound to show to a certainty which excludes the possibility of a doubt, that the loss claimed resulted from defendant's violation of the contract. Reasonable certainty, founded upon inferences legitimately and properly deducible from the evidence that the loss resulted from the breach and was the natural and proximate result thereof, is all that is required. *Id.*

3. A lease to defendant of a building in the city of New York for a term which expired May 1, 1889, contained covenants on the part of the lessee against subletting or assigning; also, that at reasonable hours in the daytime he would permit the lessor or his agent to show the premises to such persons as they desired for the purpose of selling or leasing, and that he would permit the usual notice of "To let" to be posted on the premises, and to remain there without molestation. In an action to recover damages for breach of this covenant these facts appeared: Defendant sublet the premises to another for a portion of the term, who took possession; he refused to permit the posting of any notice, and refused entrance to any one desirous of looking at the house for the purpose of leasing or purchasing; after expiration of the lease the house remained unoccupied and without being leased or sold until February 1, 1890, when it was leased for \$900 a year. Evidence was given that in May, 1889, the rental value was \$1,000; also tending to prove that directly in consequence of the violation of the covenants plaintiff suffered some loss of rent. The trial court held that the failure to rent could not, upon the evidence, be regarded as the natural or necessary consequence of the breach, and directed a judgment for nominal damages only. *Held*, error; that the covenants as to posting the notice and showing the premises, were included in

the lease to aid the lessor in releasing at the expiration of the term with the least possible delay, and in inserting them the parties contemplated an amount of rent which might be lost by an inexcusable refusal to perform them, as a proper measure of damages; and that the evidence was sufficient to require the submission of the question to the jury as to whether there was a loss of rent because of the violation of the covenants. *Id.*

4. While, where a wrong has been done from which pecuniary injury has resulted, or when injury is the natural or probable result of the wrong, the injured party is not remediless, although the extent of the injury is not capable of precise proof, yet, when the damages claimed are neither the probable result of the wrong nor capable of proof, they cannot be awarded by a jury. *Butler v. Manhattan R. Co.* 417

5. In an action by a husband to recover damages resulting from a personal injury to his wife, alleged to have been caused by defendant's negligence, the evidence tended to show that in consequence of the injury, the wife had a miscarriage. The court permitted the jury to consider and include in their verdict "any damages arising from the injury and resulting in depriving the plaintiff of prospective offspring." *Held, error.* *Id.*

DEBTOR AND CREDITOR.

1. The court has no power, in a proceeding under the Code of Civil Procedure for the voluntary dissolution of a corporation, to restrain creditors of the corporation from disposing of its bonds, held as collateral to loans under lawful contracts, empowering them to sell. *In re Binghamton G. E. Co.* 261
2. Within the meaning of the provision of the "General Corporation Law" (Chap. 687, Laws of 1892), which provides that, upon the dissolution of a corporation, its directors or managers shall, unless

other persons are appointed, be the trustees of the "creditors and stockholders," the word "creditors" includes all those to whom the corporation was under any enforceable obligation at the time of its dissolution, as well as those to whom it was indebted. *Marsteller v. Mills.* 398

3. A failure to file a chattel mortgage, where there is no change of possession of the mortgaged property, renders it void as to then existing creditors of the mortgagor, and the mortgagee cannot thereafter acquire title to property by taking possession and selling the same under the mortgage and bidding it off on the sale, and this, although the mortgage was given in good faith to secure an actual indebtedness. *Stephens v. Perrine.* 476
4. *It seems*, a *bona fide* transfer of the property by the mortgagor to the mortgagee, in payment of the mortgage debt, before a creditor has obtained judgment and execution or any lien upon the property, will give a good title to the mortgagee and so defeat the creditor's right to assail the mortgage. *Id.*
5. Under the provisions of the Code of Civil Procedure (§ 2435) authorizing a judgment creditor to institute proceedings supplementary to execution "at any time within ten years after the return wholly or partly unsatisfied of an execution against property," an execution which is effective to exhaust the remedy at law is intended; and so, it is not enough that forms are observed by the return of an execution which is not effective to reach all of the debtor's property, and the right does not arise unless at the time of issuing the execution the creditor had a judgment which was a lien on the debtor's real estate and chattels real, so that the execution could reach them as well as his personal property. *I. & T. Nat. Bank v. Quackenbush.* 567

DECEIT.

See FRAUD.

DEED.

1. In 1853 N., who was the owner of a tract of land in the city of R., laid out the same into lots and streets and caused a map thereof to be made and filed. This map showed lot No. 20 to be ninety feet front on one of the streets. Lot No. 4 as laid out on the map fronted on the same street and adjoined lot 20 on the north. A. sold and conveyed lot 4. In the deed the south line thereof was described as the north line of lot No. 20. After such conveyance A. filed a second map, on which was laid out an alley fifteen feet wide on the northerly side of lot 20, which connected with another alley, and on the same day recorded an instrument stating that said alleys were for the use of certain lots specified, not including lot 4. Lot 20 was subsequently conveyed by deed referring to the second map. In an action of ejectment brought by the owner of lot 20 against the owners of lot 4, to recover possession of the alley, *held*, that the legal effect of the instrument of dedication was simply to impose an easement on lot 20 for the benefit of the lots named; that lot 4 was not included in said benefits, and its owner had no right to the use of the alley; that the purchaser of lot 20 took title to the lot as originally laid out, subject simply to said easement, and so that his successor in title was entitled to maintain the action. *Howe v. Bell.* 190
2. The record of a deed, while it may with other facts afford a presumption of delivery by the grantor to the grantee, is not conclusive evidence of such delivery. *Townsend v. Rackham.* 516
3. Where lots in the city of New York were conveyed, bounded by a private street, laid out by the grantor on his own land, but not laid down on the permanent maps of the city, *held*, that the purchasers became vested with the usual private easements in the street, and that the personal representatives of the grantor were estopped from raising the question that because of the fact that

by statute the grantor was prohibited from laying out any streets in the city save those laid down on said maps no such easements were created. *In re St. Nicholas Terrace.* 621

DEFENSES.

1. The fact that a railroad corporation, propelling its cars by steam, has, by virtue of a private contract, surrendered the right to use steam on a small portion of its route, and that it has violated this contract, is no defense in proceedings instituted by it to condemn lands required and shown to be necessary for its corporate purposes. *In re L. I. R. R. Co.* 67
2. A defendant in an equity action cannot avail himself of the defense that an adequate remedy at law exists, unless he pleads that defense in his answer, and where the facts alleged are sufficient to entitle plaintiff to relief in some form of action, and no objection has been made by defendant in his answer or on the trial, it is too late to raise the point after judgment or upon appeal. (Re-argument ordered in this case, see note, p. 682.) *Lough v. Outerbridge.* 271
3. In an action at law to recover damages for breach of a covenant it is no answer that plaintiff had a remedy in equity to prevent the violation of the covenant and did not avail himself of it. *U. S. Trust Co. v. O'Brien.* 284
4. In an action by an employee to recover an amount claimed to be due under a contract of employment, a settlement, an accord and satisfaction, or payment in full are affirmative defenses, and where not pleaded, evidence properly received as bearing upon the terms of the contract may not be used to establish such a defense. *Dimble v. Dimick.* 549

DEFINITIONS.

1. By the will of H. she gave a fund of \$50,000 to trustees in trust to hold the same for the lives of the mother of the testatrix and of her

- daughter, the income to be paid to the mother for life and if the daughter survived, to her for life, the principal at the expiration of the trust to be paid to the issue of the daughter, if any living at her death, if none then to two nieces of the testatrix. The testatrix died leaving her mother, daughter and a child of the latter surviving. In proceedings before the surrogate to fix the amount of tax, under the Transfer Tax Act of 1892 (Chap. 399, Laws of 1892), it was decided that the value of the mother's life estate was less than \$10,000. *Held*, that under the provisions of said act (§ 22) declaring that the words "estate" and "property," as used therein, shall "mean the property or interest therein of the testator" passing or transferred, not that "passing or transferred to individual legatees," etc., and that the word "transfer" shall "include the passing of property or interest therein in possession or enjoyment," the life estate of the mother did not come within the limitation in said act (§ 2) declaring that "such transfer of property shall not be taxable under this act unless it is personal property of the value of ten thousand dollars or more;" that the limitation applied to the aggregate value of all the property so transferred, not to the separate value of each several transfer; and so, that the mother's interest was taxable; but that the estates of the daughter and grandchild were not presently taxable, and could only be taxed when their rights became fixed and actual. *In re Hoffman*. 327
2. Under the provision of the Penal Code defining murder in the first degree (§ 183), which includes the killing of a human being "by a person engaged in the commission of or attempt to commit a felony either upon or affecting the person killed, or otherwise," the word "otherwise" is not confined to felonies against property simply, but also includes a felony upon or against a person other than the one killed. *People v. Miles*. 383
3. Within the meaning of the provision of the "General Corporation Law" (Chap. 687, Laws of 1892), which provides that, upon the dissolution of a corporation, its directors or managers shall, unless other persons are appointed, be the trustees of the "creditors and stockholders," the word "creditors" includes all those to whom the corporation was under any enforceable obligation at the time of its dissolution, as well as those to whom it was indebted. *Marsteller v. Mills*. 398
4. The term "every railroad corporation" in the General Railroad Law (§ 4, chap. 565, Laws of 1892), and, *it seems*, the term "all existing corporations" in the General Railroad Act of 1850 (Chap. 140, Laws of 1850) includes foreign railroad corporations, which under authority of law have extended and are operating their roads in this state, and that under the former act (§ 7) such a corporation had authority to acquire by condemnation additional real estate when needed for the proper operation of its road and to meet the public demands of travel and traffic. *N. Y., N. H. & H. R. R. Co. v. Welsh*. 411

DIVORCE.

1. While the uncorroborated evidence of prostitutes alone is insufficient to sustain a charge of adultery in an action for divorce, yet slight corroboration is sufficient where the defendant fails to take the stand in his own behalf. *McCarthy v. McCarthy*. 235
2. In an action by a wife for divorce on the ground of adultery, where the case is litigated, it is not incumbent upon the plaintiff to make affirmative proof of the allegations inserted in her complaint in compliance with the rules of the Supreme Court (Rule 73), *i. e.*, that the adultery charged was "without the consent, privity or procurement of the plaintiff," and that the latter has not voluntarily cohabited with defendant since discovery of the fact; these are matters of affirmative defense. It is only to provide for a case of defendant suffering a default that these possible defenses are re-

quired to be negatived by plaintiff by verified complaint or affidavit. *Id.*

8. Where, in such an action, the charges of adultery in the complaint are put in issue by the answer, and counterallegations of adultery on the part of plaintiff are made thereon and the issues are tried together, the reception of testimony of the plaintiff, incompetent under the Code of Civil Procedure (§ 831) as to the issues presented upon the charges in the complaint, but which is competent upon the issues presented by the counter charges in the answer, is not error. *Id.*

4. It is within the discretion of the court in such an action brought by the wife to provide that alimony shall be paid from the time of the commencement of the action. *Id.*

5. The complaint in an action for divorce brought by the wife alleged that the parties were married in this state and that plaintiff resided here. The summons was served in this state and defendant appeared and answered. The answer, after denying the commission of the offenses charged in the complaint, as a separate defense alleged that both parties were, "at all the times mentioned in the complaint," residents of the state of Pennsylvania, and that the courts of this state had no jurisdiction. To this plaintiff demurred as upon its face insufficient. Upon the pleadings and other proof which warranted a finding that the parties, before the commencement of the action, had separated, and that plaintiff was then a resident of this state as defined by the Code of Civil Procedure (§ 1768), an order was granted directing the payment by plaintiff of sums specified for counsel fee and alimony. *Held*, that the court had power to make the order; that even if the fact of residence in another state was to be deemed settled by the demurrer, the legal effect of the fact presented an issue of law which defendant had no absolute right to have decided upon a motion,

and the court has power to compel defendant to furnish plaintiff with means to meet it in the usual way; but that no such effect could be given to the pleadings upon a motion like this, in such an action. *Gray v. Gray.* 854

DOMICILE.

1. The domicile or home requisite as a qualification for voting means a residence which the voter voluntarily chooses and has a right to take as such, and which he is at liberty to leave. *People v. Cady.* 100

2. The New York city prison, "The Tombs," is not a place of residence save for the keeper and his family, and a person cannot, under the guise of a commitment, or even without any commitment, go there as a prisoner and gain a residence. *Id.*

DOWER.

1. To entitle a wife to dower the husband must be seized either in fact or in law of a present freehold in the premises as well as an estate of inheritance. *Phelps v. Phelps.* 197

2. Such a seizin cannot be predicated with respect to lands purchased with the moneys of the husband, but not conveyed or agreed to be conveyed to him. *Id.*

3. In an action by the wife to set aside an ante-nuptial agreement, by the terms of which she surrendered all claim to dower, it appeared undisputably that defendant at the time the agreement was made owned real estate of the value of \$100,000; that the relinquishment of dower was not a condition of the engagement of marriage; that there was no negotiation between the parties on that subject before they met and executed the agreement; that defendant then stated that he wanted it arranged so that he could buy and sell real estate without interference from her, but did not disclose to her that this would mean a relinquishment of her dower

right; that no consideration was paid for the surrender, and that she acted without the aid of counsel. *Held*, that the General Term properly reversed on the facts a judgment of Special Term in favor of defendant; and that plaintiff was entitled to the relief sought. *Graham v. Graham*. 573

EARL, J.

Proceedings on retirement of. 683

EASEMENT.

1. In 1853 N., who was the owner of a tract of land in the city of R., laid out the same into lots and streets and caused a map thereof to be made and filed. This map showed lot No. 20 to be ninety feet front on one of the streets. Lot No. 4 as laid out on the map fronted on the same street and adjoined lot 20 on the north. A. sold and conveyed lot 4. In the deed the south line thereof was described as the north line of lot No. 20. After such conveyance A. filed a second map, on which was laid out an alley fifteen feet wide on the northerly side of lot 20, which connected with another alley, and on the same day recorded an instrument stating that said alleys were for the use of certain lots specified, not including lot 4. Lot 20 was subsequently conveyed by deed referring to the second map. In an action of ejectment brought by the owner of lot 20 against the owners of lot 4, to recover possession of the alley, *held*, that the legal effect of the instrument of dedication was simply to impose an easement on lot 20 for the benefit of the lots named; that lot 4 was not included in said benefits, and its owner had no right to the use of the alley; that the purchaser of lot 20 took title to the lot as originally laid out, subject simply to said easement, and so that his successor in title was entitled to maintain the action. *Howe v. Bell*. 190

2. Where lots in the city of New York were conveyed, bounded by

a private street, laid out by the grantor on his own land, but not laid down on the permanent maps of the city, *held*, that the purchasers became vested with the usual private easements in the street, and that the personal representatives of the grantor were estopped from raising the question that because of the fact that by statute the grantor was prohibited from laying out any streets in the city save those laid down on said maps no such easements were created. *In re St. Nicholas Terrace*. 621

EJECTMENT.

1. Where a telegraph and telephone company, organized under the laws of this state (Chap. 265, Laws of 1848, as amended by chap. 471, Laws of 1853), had, without the consent of an adjoining owner, who owned the fee of a highway, and without having acquired the right by condemnation proceedings, erected its poles in the highway and strung wires thereon for the purposes of its business, *held*, that such a use of the highway was unlawful; and that an action of ejectment was maintainable against it. *Eels v. Am. Tel. & Tel. Co.* 133
2. In 1853 N., who was the owner of a tract of land in the city of R., laid out the same into lots and streets and caused a map thereof to be made and filed. This map showed lot No. 20 to be ninety feet front on one of the streets. Lot No. 4 as laid out on the map fronted on the same street and adjoined lot 20 on the north. A. sold and conveyed lot 4. In the deed the south line thereof was described as the north line of lot No. 20. After such conveyance A. filed a second map, on which was laid out an alley fifteen feet wide on the northerly side of lot 20, which connected with another alley, and on the same day recorded an instrument stating that said alleys were for the use of certain lots specified, not including lot 4. Lot 20 was subsequently conveyed by deed referring to the second map. In an action of ejectment brought by

the owner of lot 20 against the owners of lot 4, to recover possession of the alley, *held*, that the legal effect of the instrument of dedication was simply to impose an easement on lot 20 for the benefit of the lots named; that lot 4 was not included in said benefits, and its owner had no right to the use of the alley; that the purchaser of lot 20 took title to the lot as originally laid out, subject simply to said easement, and so that his successor in title was entitled to maintain the action. *Hove v. Bell.* 190

8. Where in an action of ejectment plaintiff claimed title under a devise in a will by which a legacy was given to one of the defendants and made chargeable upon the real estate in question, *held*, that the legacy did not constitute a counterclaim; also, that plaintiff was not required to demur to the answer setting it up as a counterclaim in order to raise the question, nor did he, by replying, waive his right to take the objection. *Dinan v. Conely.* 544

4. Where in an action of ejectment plaintiff proves a clear legal title to the land, and defendant relies upon an equitable claim, this he is bound to establish, the same as he would had he commenced an action for equitable relief. *Dyke v. Spargur.* 651

5. In an action of ejectment plaintiff proved title under a sale on foreclosure of mortgages covering a tract of land including the land in question executed in 1852 by the then owner. These facts appeared from defendants' evidence: In 1861 the owner gave D. a contract for the land in question. In 1867 D. executed a conveyance thereof to R., who gave a contract therefor to H. The latter executed a conveyance thereof to defendants. At the time of the commencement of the foreclosure suit R. was in possession. D. and R. were parties to the foreclosure suit. Neither the plaintiff in the foreclosure suit nor the purchaser at the foreclosure sale had notice of any rights or interest of H. in the land. It appeared that D. be-

fore the conveyance to R. executed a conveyance of the land to another for a good consideration; also, that neither of the contracts above specified were ever performed. *Held*, that defendants failed to show any title or equitable interests; and so, were not entitled to any relief. *Id.*

ELECTION (OF OFFICERS).

1. The domicile or home requisite as a qualification for voting means a residence which the voter voluntarily chooses and has a right to take as such, and which he is at liberty to leave. *People v. Cady.* 100

2. On the trial of an indictment for illegal registration these facts appeared: The defendant, at the time of his registration, was confined in the Tombs as a vagrant under a commitment for six months issued by one of the commissioners of charities and correction; he had been in that prison most of the time for about seven years under similar commitments. All of these commitments were issued upon his application. When one commitment ran out he would immediately or soon after make application for another. He was employed in doing light work and errands, and while thus employed was permitted to go in and out of the prison. Defendant testified that he lived in the Tombs, and had for seven years; that he had no other home, and intended to make the prison his home as long as he could not get any other home. He registered in the election district which included the said prison. *Held*, that the defendant was at all times when at the Tombs a prisoner, and so he was not a resident in the district, and was properly found guilty of the offense charged. *Id.*

3. The provision of the Penal Code (§ 29) which declares that "a person who, directly or indirectly, counsels, commands, induces or procures another to commit a crime is a principal," applies to the provision of said Code (§ 41c) declaring that any member of a registry

board who willfully violates any provision of the Election Law relative to the registration of electors shall be punishable by imprisonment, etc. *People v. McKane*. 455

4. A person, therefore, who, although not a member of a board of registry, induces or procures its members to willfully violate a provision of the Election Law (Chap. 680, Laws of 1892) in relation to the registration of voters, is guilty of a crime and may be indicted as a principal jointly with the members of the board. *Id.*

5. Defendant was indicted jointly with inspectors of election constituting a board of registry for a willful violation of the provision of said law (§ 38), which directs the inspectors to make three copies of the register of voters, and requires that the register and copies "shall at all reasonable hours be accessible to the public for examination or for making copies thereof." Defendant was not a member of the board of registry, but was charged with willfully and feloniously procuring, by his aid, counsel, command and assistance, the inspectors to conceal the lists and to refuse the public access thereto. Defendant was tried separately; upon the trial no direct evidence was given that he committed or advised the inspectors to conceal the registry lists, but the prosecution attempted to show a criminal conspiracy on the part of defendant and other public officials of the town for the purpose of casting a large fraudulent vote, and a concealment of the lists as a necessary part of the scheme. No conspiracy was charged in the indictment. *Held*, unnecessary, as the conspiracy, if shown, was evidence in support of the charge made. *Id.*

6. These facts appeared on the trial: The town board of the town of G., of which board defendant, as supervisor, was the presiding officer, divided the town into six election districts. These were so arranged that all of them converged in the town hall, in which building the registry lists were prepared and the vote cast for the entire

town. The inspectors in all the districts concealed the registry lists and willfully neglected and refused to give the public access to them, and the evidence tended to show that they were all acting in furtherance of a common plan. G., a candidate for an office to be voted for at the election, instituted judicial proceedings to compel the performance of their duty by the inspectors. Defendant employed counsel to resist these proceedings, and made an affidavit, to be used therein, in which he stated, among other things, that he had examined the lists and that they contained no fraudulent names. Defendant was chief of police, and as such, and as chairman of the town board, had charge and control of the town hall. G. sent a large body of men to the town hall to obtain access to the lists and make copies thereof; they were all driven from the hall, some beaten and some arrested and imprisoned. Another body of G.'s supporters, who went to the town hall on election day for the purpose of watching the proceedings, were treated in a similar manner. Many were arrested without cause. Defendant was the leader in all these proceedings. The registry lists contained a great number of names of persons not legal voters and not residents of the town, and the vote at the election, as reported and certified by the canvassers, was much larger than the number of actual voters. Defendant had been supervisor for eight successive terms, and during that time the vote of the town was nearly unanimous in favor of the candidates he supported, which were sometimes of one political party, sometimes of another. *Held*, that the evidence was sufficient to sustain the indictment.

EMINENT DOMAIN.

1. The fact that a railroad corporation, propelling its cars by steam, has, by virtue of a private contract, surrendered the right to use steam on a small portion of its route, and that it has violated this contract, is no defense in proceedings instituted by it to condemn

lands required and shown to be necessary for its corporate purposes. *In re L. I. R. R. Co.* 67

2. The company's corporate rights of eminent domain are unaffected by the breach of contract, and may still be exercised in a proper case. *Id.*

3. Commissioners appointed under the General Railroad Act (Chap. 140, Laws of 1850, as amended) in proceedings to condemn lands for railroad purposes, are judges of the law and the fact so far as relates to the compensation to be awarded to landowners. When their order has been confirmed and the order of confirmation has been affirmed by the General Term of the Supreme Court, no further appeal can be taken. *In re S. B. R. R. Co.* 253

4. The legislature has power to authorize a foreign railroad corporation, lawfully operating its road within this state, to acquire by condemnation additional lands required for railroad purposes. *N. Y., N. H. & H. R. R. Co. v. Welsh.* 411

5. All private property within the state is subject to the right of the legislature to appropriate it for a necessary and reasonable public use, a just compensation being provided to be paid therefor, and there is no distinction in this respect in favor of corporations whose franchises and operations impart to them a *quasi* public character, if in order the better to subserve the public use the appropriation is necessary. *In re City of Brooklyn.* 596

EQUITY.

1. *It seems* the old rule in equity, that where in an action to compel specific performance of a contract to convey real estate, it appears that the defendant is unable to perform in consequence of a defect in his title, which arose after the making of the contract, without fault on his part, and the plaintiff knew of the defect when he commenced his action, the

court will not retain the action for the purpose of awarding damages, has been so modified by the practice under the Code, which authorizes the joinder of legal and equitable causes of action, that in such case the action will be retained, and the issue as to breach and damages sent to a jury for trial. *Haffey v. Lynch.* 241

2. Neither the old rule nor the ground upon which it was based had any application to a case where the defect has disappeared at the time of trial, and in such case, both under the old rule and the present practice, where it appears that there was a defect at the time of the commencement of the action, but the same has ceased to exist, and the vendor's title is valid and perfect at the time of trial, plaintiff is entitled to a judgment for specific performance. *Id.*

3. Equity courts, as a general rule, look at the conditions existing at the time of the close of a trial therein and adapt their relief to those conditions, and the plaintiff will not be turned out of court because of any defense interposed, if at the time of trial the facts are such that, if he then commenced the action, he would be entitled to the equitable relief sought. *Id.*

4. A defendant in an equity action cannot avail himself of the defense that an adequate remedy at law exists, unless he pleads that defense in his answer, and where the facts alleged are sufficient to entitle plaintiff to relief in some form of action, and no objection has been made by defendant in his answer, or on the trial, it is too late to raise the point after judgment or upon appeal. (Re-argument ordered in this case, see note, p. 682.) *Lough v. Outerbridge.* 271

5. An agreement by the vendor, upon sale of a business and its good will, that he will not engage in a similar business in the same place for a period specified, is legal and valid and will be enforced by a court of equity. *Francisco v. Smith.* 488

ESTOPPEL.

1. Plaintiff, who, as his complaint stated, sued as a stockholder of a mining corporation in his own behalf and that of others similarly situated, sought to set aside and annul various transactions relating to and conveyances of property alleged to belong to the corporation, on the ground that said conveyances were fraudulent, and intended to injure and defraud plaintiff and others similarly situated. Among the alleged fraudulent transactions was the foreclosure of a mortgage executed by the company. The complaint alleged that in the foreclosure suit the corporation and the trustee for the mortgage bondholders were made defendants, and appeared and answered, setting forth the same matters as were set forth in the complaint herein, and the same issues were presented in that action as in this; those issues were litigated in that action and determined against the defendants. No allegations of collusion or other grounds which would give a court of equity jurisdiction to set aside the judgment were made against it. *Held*, that plaintiff was estopped by said judgment; that plaintiff's right of action was a derivative one, he suing not primarily in his own right, but in that of the corporation, and so any defense which defendants would have if the corporation was plaintiff might be interposed against the stockholder. *Alexander v. Donohoe*. 203
2. A mere device of one party to a contract intended to shield him from the results of his own fraud practiced upon the other party cannot be the basis of an equitable estoppel. *Brädger v. Goldsmith*. 424
3. So, also, where one party to a contract has perpetrated a fraud upon the other by means of which the latter was induced to enter into the contract, he cannot be precluded from seeking redress by a provision in the contract purporting to grant to the former immunity against the consequences of any fraud. *Id.*
4. The rule that an estoppel binds the parties and their privies in estate and blood applies only as to a subsequent party when he simply represents the rights and interests of the party who created the estoppel. It does not apply to a party who, in the process of transferring real estate, has acquired a better title than his predecessor had. *Lyon v. Morgan*. 505
5. S., who had a record title to an undivided one-fourth of certain real estate, was present when his co-owner executed a mortgage upon the whole parcel. The mortgagor asserted at the time that he was the sole owner, and that S. had no interest therein. S. assented to this and disclaimed all interest in the land. The mortgagee thereupon, without further inquiry as to title, took the mortgage. The interest of S. was thereafter sold on execution against him. Plaintiff purchased and received the sheriff's deed in good faith, relying upon the recorded title, and in ignorance of what took place when the mortgage was given. In an action for partition defendants claimed title to the whole of the land under a sale on foreclosure of the mortgage. It did not appear that there was any actual possession of the land when plaintiff purchased and took his conveyance which would operate as a constructive notice. *Held*, that plaintiff was protected by the Recording Act against an undisclosed equity in favor of the holder of the mortgage; that while S. was estopped from questioning the lien of the mortgage, the estoppel did not extend to and bind plaintiff, a bona fide purchaser; that he had a better title than S. which could not be defeated by an estoppel of which he had neither actual nor constructive notice. *Id.*
6. Neither S. nor his judgment creditor or plaintiff were made parties to the foreclosure suit. *Held*, that, conceding plaintiff was bound by the estoppel, this extended only to the lien of the mortgage, and the legal title remained in him subject thereto;

that S., or whoever represented his title at the time, was a necessary party to the foreclosure suit, and, as to his equity of redemption, the mortgage had not been foreclosed. *Id.*

7. In an action under the General Manufacturing Act (§ 18, chap. 40, Laws of 1848) to enforce the liability imposed by the act upon a stockholder of an insolvent corporation, to excuse the non-performance of the condition precedent to such liability, *i. e.*, the recovery of a judgment against the corporation and the return of an execution issued thereon unsatisfied, plaintiff produced a record of a judgment in an action in the Supreme Court, brought by a judgment creditor of the corporation to sequester its property and for the appointment of a receiver. The complaint in that action alleged the recovery of a judgment against the corporation in the Auburn City Court, and the issue and return of an execution thereon unsatisfied. The judgment granted the relief sought, and forbade creditors from suing the company. The corporation was not located in said city. Defendant claimed that the judgment was void for want of jurisdiction, and so the injunction was a nullity and might have been disregarded. *Held*, that the complaint in the former action presented a case over which the court had jurisdiction; that the question as to the validity of the City Court judgment was one of law for it to decide, and, although it erred in adjudging it to be valid, this was a judicial error, and the judgment of sequestration could not be attacked collaterally, but the mistake, if made, was available only on appeal or some direct review of the decision. *Hunting v. Blun.* 511

8. A party who has entered into a contract with another, in which the latter assumes to be and contracts as a corporation, is estopped from denying the corporate existence. *U. S. Vinegar Co. v. Schlegel.* 587

9. The principle that where an agent has been clothed by his principal

with power to do an act in case of the existence of some fact peculiarly within the knowledge of the agent, and where the doing of the act is of itself a representation of the existence of the fact, the principal is estopped from denying its existence as against third parties dealing with the agent in good faith, and in reliance upon the representation, does not apply to a case where the agent, assuming to act for his principal, was himself the other party. *Bank N. Y. Nat. Bkg. Assn. v. Am. D. & T. Co.* 559

10. Where lots in the city of New York were conveyed, bounded by a private street, laid out by the grantor on his own land, but not laid down on the permanent maps of the city, *held*, that the purchasers became vested with the usual private easements in the street, and that the personal representatives of the grantor were estopped from raising the question that because of the fact that by statute the grantor was prohibited from laying out any streets in the city save those laid down on said maps no such easements were created. *In re St. Nicholas Terrace.* 621

EVIDENCE.

1. In an action to compel specific performance by the vendor of a contract for the sale of land, it appeared that plaintiff acquired title on sale under a judgment in a foreclosure suit, one of the defendants in which was an infant. Plaintiff here claimed that the summons was not served on said infant, and so his interest was not cut off by the foreclosure judgment. The judgment roll was put in evidence; it contained a petition, entitled in the action, signed and verified by the father of the infant, which stated that the summons and a copy of the complaint were served upon the infant "on the — day of September" in the year stated. The petition prayed for the appointment of a guardian *ad litem* for the infant. Such a guardian was appointed; he appeared in the action and put in the usual answer

- of such a guardian. *Held*, that the judgment roll contained sufficient and competent evidence of service of the summons. *Murphy v. Shea*. 78
2. Upon trial of an indictment charging the presentation to a fire insurance company of a false and fraudulent claim for alleged loss by fire of property insured, defendant's books of account, which had been seized and brought into court, were introduced in evidence. No objection was made on the part of defendant on the ground that the books were produced against his will. *Held*, that there was no compulsion within the meaning of the constitutional provision declaring that no person in a criminal action shall be compelled to testify against himself, and that in the absence of such an objection the books were competent evidence, and this, although their production and use could be said to have been proof of defendant's own confession or admission, instead of a part of the *res gestae* of the crime. *People v. Speigel*. 107
3. *It seems*, the court may take judicial notice that the "diamond stack" and the "straight stack spark arresters" are in very general use upon the railroads of the country, and are both well-known systems for arresting sparks. *Prace v. N. Y., L. E. & W. R. R. Co.* 182
4. In 1853 N., who was the owner of a tract of land in the city of R., laid out the same into lots and streets and caused a map thereof to be made and filed. This map showed lot No. 20 to be ninety feet front on one of the streets. Lot No. 4 as laid out on the map fronted on the same street and adjoined lot 20 on the north. A. sold and conveyed lot 4. In the deed the south line thereof was described as the north line of lot No. 20. After such conveyance A. filed a second map, on which was laid out an alley fifteen feet wide on the northerly side of lot 20, which connected with another alley, and on the same day recorded an instrument stating that said alleys were for the use of certain lots specified, not including lot 4. Lot 20 was subsequently conveyed by deed referring to the second map. In an action of ejectment brought by the owner of lot 20 against the owners of lot 4, to recover possession of the alley, it appeared that A. was dead at the time of the trial; his son was called as a witness, and testified that the maps were made and filed in the order above stated. His evidence was objected to as incompetent under the provision of the Code of Civil Procedure (§ 829) on the ground that the father of the witness was the common grantor of the parties. *Held*, untenable, as the owners of lot 4 took no title from A. of the land in dispute. *Howe v. Bell*. 190
5. Plaintiff and the three defendants were the children and only heirs at law of P., who died intestate, owning a farm of 162 acres. In an action for partition defendants claimed that P. in his lifetime conveyed to plaintiff's wife fifty-nine acres, then a part of the farm, three absolutely and the remainder subject to a life estate reserved by the grantor; that such conveyance was intended by P. as an advancement and as and for plaintiff's share in his father's real estate, and was accepted by the wife, with knowledge of such intent, and that plaintiff knew and acquiesced in the conveyance for such purpose. *Held*, that parol evidence was competent to show that said deed was intended as an advancement to plaintiff; also that such an advancement could be made by the conveyance to the wife; but that it was incumbent on defendants to establish by satisfactory evidence that said conveyance was in fact made as an advancement. *Palmer v. Culbertson*. 218
6. The constitutional and statutory provisions (U. S. Const. art. 5; State Const. art. 1, § 6; Code Civ. Pro. § 887; Code Crim. Pro. § 10), declaring that no person shall be compelled to testify against himself in any criminal case, protects a person called as a witness in any judicial or other proceeding

against himself, or upon the trial of issues between others, from being compelled to disclose facts or circumstances that can be used against him as admissions tending to prove his connection with any criminal offense of which he may then or thereafter be charged, or the sources or the means by which evidence of its commission or of his connection with it may be obtained. Nothing short of absolute immunity from prosecution can take the place of the privilege so given. *People ex rel. v. Forbes.*

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7. The witness is himself in such a case the judge as to the effect of answers sought to be drawn from him, and if to his mind it may constitute a link in the chain of evidence sufficient to convict him or put him in jeopardy, if other facts are shown, he may remain silent, unless it be perfectly clear that he is mistaken and that the answer cannot possibly injure him, or tend in any way to subject him to the peril of prosecution. *Id.*

8. The parties entered into a contract by which plaintiff agreed to supervise and build a house for defendant, to contract for the work and charge everything at the exact cost, for which he was to furnish vouchers. In an action to recover a balance alleged to be due for moneys paid out by plaintiff for work and materials, it appeared that plaintiff rendered a statement to defendant of moneys expended, accompanied by the vouchers therefor, and upon the trial he proved the expenditure of all the moneys claimed. *Held*, that the evidence was sufficient to sustain a recovery; that plaintiff acted as agent for defendant, and as such was bound simply to act in good faith and in the usual way in making expenditures; that it was not necessary for him to show that all the materials charged were actually used in the building, but the vouchers were sufficient *prima facie* evidence, and as to the labor, it was sufficient for him to show, as was shown, that he employed men upon the building under foremen who kept their

time, and that he made payments according to the time thus kept. *Blazo v. Gill.*

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9. Where, in an action for divorce, the charges of adultery in the complaint are put in issue by the answer, and counter allegations of adultery on the part of plaintiff are made thereon, and the issues are tried together, the reception of testimony of the plaintiff, incompetent under the Code of Civil Procedure (§ 831) as to the issues presented upon the charges in the complaint, but which is competent upon the issues presented by the counter charges in the answer, is not error. *McCarthy v. McCarthy.*

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10. Suspicion cannot give probative force to testimony in a criminal action which is, in itself, insufficient to establish or justify an inference of a particular fact, and proof of one offense cannot aid in establishing another, which other is not only not proved, but as to which there is no affirmative evidence from which a legal inference of its commission can be drawn. *People v. Van Zile.*

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11. One of the defenses interposed to an indictment for murder was insanity; after evidence had been given on the part of the defense as to the words and actions of defendant on an occasion specified, which it was claimed were so strange and inexplicable as to indicate insanity, the prosecution was allowed to show that on that occasion defendant was intoxicated. *Held*, no error. *People v. Miles.*

383

12. In an action by a husband to recover damages resulting from a personal injury to his wife, alleged to have been caused by the defendant's negligence, it appeared that the injury to the wife was caused by the closing of the gate to the platform of one of defendant's cars, as she was seeking to enter the car. The wife testified to the injury, that the guard was looking another way, and that immediately after the injury she made an exclamation of pain. She

was then permitted to testify to an insulting remark made by the guard in reply to her exclamation of pain. *Held*, error. *Butler v. Manhattan R. Co.* 417

13. While, in such an action, proximity in time with the act causing the injury is essential to make what was said by a third person competent evidence as part of the *res gestæ*, that alone is insufficient; to make it competent what was said must be part of the principal fact, and so part of the act itself; that is, naturally accompanying the act, or calculated to unfold its character and quality.

Id.

14. Defendant was indicted jointly with inspectors of election constituting a board of registry for a willful violation of the provision of the Election Law (§ 33, chap. 680, Laws of 1892), which directs the inspectors to make three copies of the register of voters, and requires that the register and copies "shall at all reasonable hours be accessible to the public for examination or for making copies thereof." Defendant was not a member of the board of registry, but was charged with willfully and feloniously procuring, by his aid, counsel, command and assistance, the inspectors to conceal the lists and to refuse the public access thereto. These facts appeared on the trial: The town board of the town of G., of which board defendant, as supervisor, was the presiding officer; divided the town into six election districts. These were so arranged that all of them converged in the town hall, in which building the registry lists were prepared and the vote cast for the entire town. The inspectors in all the districts concealed the registry lists and willfully neglected and refused to give the public access to them, and the evidence tended to show that they were all acting in furtherance of a common plan. G., a candidate for an office to be voted for at the election, instituted judicial proceedings to compel the performance of their duty by the inspectors. Defendant employed counsel to resist

these proceedings, and made an affidavit, to be used therein, in which he stated, among other things, that he had examined the lists and that they contained no fraudulent names. Defendant was chief of police, and as such and as chairman of the town board, had charge and control of the town hall. G. sent a large body of men to the town hall to obtain access to the lists and make copies thereof; they were all driven from the hall, some beaten and some arrested and imprisoned. Another body of G.'s supporters, who went to the town hall on election day for the purpose of watching the proceedings, were treated in a similar manner. Many were arrested without cause. Defendant was the leader in all these proceedings. The registry lists contained a great number of names of persons not legal voters and not residents of the town, and the vote at the election, as reported and certified by the canvassers, was much larger than the number of actual voters. Defendant had been supervisor for eight successive terms, and during that time the vote of the town was nearly unanimous in favor of the candidates he supported, which were sometimes of one political party, sometimes of another. A witness for the prosecution testified to declarations made to him by defendant in a conversation through the telephone; at the time the witness did not know defendant, or recognize his voice. The witness further testified that he heard an affidavit read made by defendant read in his presence, in which he stated he had the conversation by telephone testified to, giving, however, a different version of it. This affidavit was introduced in evidence by defendant, who also testified as to the conversation. *Held*, that while the testimony as to the conversation was inadmissible when given, the objection was cured by what subsequently appeared. *People v. McKane*. 455

15. Also *held*, that testimony as to the arrest of the persons seeking to examine the registry and to watch the proceedings at the election was competent. *Id.*

16. Also *held*, that evidence on the part of the prosecution as to the receipt of large sums of money by defendant as supervisor was competent, and that the receipt of evidence of the sale of liquors on Sunday by the saloons in the town was not reversible error. *Id.*
17. Also *held*, that evidence as to the arrangement of the election districts was properly received, as was also evidence as to the number of legal voters in the town. *Id.*
18. Also *held*, that the poll lists were properly given in evidence. *Id.*
19. Defendant, as a witness in his own behalf, testified that the number of voters in the town had increased since the vote of previous years. *Held*, that the poll lists of those years were properly received in evidence. *Id.*
20. On cross-examination of defendant various questions were asked as to his official acts in administering the affairs of the town, the position he held in politics and his ability to control the action of both political organizations. The testimony was received under objection and exception. *Held*, no error. *Id.*
21. Defendant called witnesses to prove his good character. On their cross-examination various questions were asked, and they were permitted to answer under objection and exception as to what they had heard in respect to defendant's political power and influence. *Held*, no error. *Id.*
22. A witness for the prosecution was permitted to testify that when the registry lists were nearly completed he went to the town hall, where he found a man in charge who, by his dress, appeared to be a policeman; that witness told the man he wanted to see the lists in order to make copies, and the answer was that he could not do so without an order from defendant. Defendant subsequently admitted that the man was acting under his orders. *Held*, that the evidence was properly received. *Id.*
23. Another witness for the prosecution was permitted to testify that he served an order of the court in the proceedings to obtain access to the lists upon the chairman of one of the boards of registry, and also as to what was said to him at the time. *Held*, no error. *Id.*
24. The witness further testified that he served a like paper on another member of the board, and added that the person served said he was going to hand the paper to defendant. This was not called for by any question of the prosecution. *Held*, that while the testimony was inadmissible, in the absence of any motion to strike it out, there was no error. *Id.*
25. Evidence was also received to the effect that one of the inspectors, who was also a principal of a school in the town, having six teachers under his charge, was absent three days during the efforts to obtain access to the registry lists. *Held*, no error. *Id.*
26. When sufficient evidence of a conspiracy has been given to make the question one for the jury, evidence of the acts and declarations of the alleged conspirators in furtherance of the common purpose is competent. *Id.*
27. Defendant, a corporation authorized by its charter to receive goods for storage and issue warehouse receipts, which were made negotiable, by a by-law directed the warehouse receipts to be signed by its president or secretary. S., its president, applied to plaintiff for and obtained a personal loan, giving therefor his own note and as collateral security a warehouse receipt purporting to be issued by defendant, signed by him as president, acknowledging the receipt on storage for account of himself and subject to his order of a quantity of cotton. Plaintiff's officers knew when the loan was made that the person to whom it was made was defendant's president,

and that the loan was a personal one. The loan was made on the faith of the collateral. S., in fact, had deposited no cotton with defendant. The note was not paid at maturity, and defendant, on demand made, refused to deliver the cotton or pay its value. In an action to recover damages, *held*, that the by-law did not clothe the president with authority to issue receipts to himself for cotton which in truth had been deposited by him; and that the trial court properly refused to receive evidence of what S. said at the time when he procured the loan. *Bank N. Y. Nat. Bkg. Assn. v. Am. D. & T. Co.* 559

28. The declarations of an agent are only admissible against his principal when the agent is acting at least *prima facie* for his principal and within the scope of his actual or apparent authority. *Id.*

29. A provision in a building contract that the contractor will "do" a certain amount of "brick work" may mean simply the work of laying the brick, or it may include the furnishing as well as laying them, and parol evidence is competent in such case to show the sense in which the parties used the words. *Streppone v. Lennon.* 626

EXECUTION.

1. Plaintiff's complaint alleged in substance these facts: B. died leaving a will by which she directed her executors to sell her real estate when it seemed to them best, and hold the proceeds in trust to pay over the income to her daughters M. and F. during their lives, and upon the death of either, the principal of her share to go to her children. M. died leaving three children. At that time the power of sale had not been executed. Her children executed a conveyance to G., their father, for life, of "so much of the interest and income mentioned and provided for" in said will "as would come and accrue to said children under and by virtue of the provisions contained in said will." The interest of G. in said land was

subsequently sold on execution against him. Thereafter the remaining executor, one of them having been removed, sold and conveyed the land and received the proceeds. The purchaser at the execution sale conveyed to plaintiff all his interest in the real estate, the income and the proceeds of the sale thereof. The plaintiff asked equitable relief. *Held*, that the complaint failed to state a cause of action; that said conveyance to G. did not purport to convey any interest in the land, but at most only an interest in the trust fund after the land had been converted into money, and if G. took an interest under it, it was simply a possible equity in the trust fund, and so he had no legal title to which the lien of the judgment against him could attach, and the execution sale passed nothing to the purchaser; that the complaint was insufficient to reach any such equitable interest, as equitable assets only can be reached after the remedy by law is exhausted, the evidence of which is the return of an execution unsatisfied, and the complaint contained no such allegation; also, that plaintiff could not assert an interest in G. as tenant by the curtesy in his wife's land; that if, as to the land in question, she was seized at all, she took only a nominal fee which was subject to be and was defeated by the execution of the power of sale; also, that the right of a tenant by the curtesy is a legal right to be enforced against the claimant in possession, and so could not be enforced in this action as the purchaser under the sale by the executors was not a party. *Harvey v. Brisbin.* 151

2. Under the provisions of the Code of Civil Procedure (§ 2435) authorizing a judgment creditor to institute proceedings supplementary to execution "at any time within ten years after the return wholly or partly unsatisfied of an execution against property," an execution which is effective to exhaust the remedy at law is intended; and so, it is not enough that forms are observed by the return of an execution which is not effective to

reach all of the debtor's property, and the right does not arise unless at the time of issuing the execution the creditor had a judgment which was a lien on the debtor's real estate and chattels real, so that the execution could reach them as well as his personal property. *I. & T. Nat. Bank of N. Y. v. Quackenbush.* 567

EXECUTOR AND ADMINISTRATOR.

An assignment of a mortgage by an administrator of a deceased mortgagee to a third person, and by the latter to the administrator individually, is not void, but voidable at the election of the next of kin of the intestate; and so, in an action by the administrator, in his own name as owner, to foreclose the mortgage, the mortgagor and his successors in interest may not controvert plaintiff's title. *Read v. Knell.* 484

FIDUCIARY RELATION.

See CONFIDENTIAL RELATION.

FINE.

1. The imposition of a fine is a species of punishment, and before any body, tribunal or officer can impose it, authority so to do must be clearly found in some statute. *People ex rel. v. Bd. Edn. N. Y.* 62
2. The provision of the New York Consolidation Act (Chap. 410, Laws of 1882) giving to the board of education "full control of the public schools, and the public school system of the city, subject only to the general statutes of the state upon education," does not give to that board power to impose a fine upon a teacher, either payable in money or by forfeiture of salary for a specified period, for violating the orders of the superintendent, or, *it seems*, for any misconduct or dereliction, in the absence of any by law, rule or regulation known or assented to by the teacher providing for the imposition of such a fine. *Id.*

FORECLOSURE.

1. An assignment of a mortgage by an administrator of a deceased mortgagee to a third person, and by the latter to the administrator individually, is not void, but voidable at the election of the next of kin of the intestate; and so, in an action by the administrator, in his own name as owner, to foreclose the mortgage, the mortgagor and his successors in interest may not controvert plaintiff's title. *Read Knell.* 484
2. In such an action the defendants pleaded a defect of parties, in that the next of kin of the deceased mortgagee were not made parties. It appeared that the only next of kin were plaintiff and a sister who died without issue. It was claimed that she married and left a will. The alleged will was admitted to probate, but the surrogate's decree was reversed by the General Term, and the questions involved were sent to a jury for trial. At the time of the trial of the action these questions remained undisposed of, and no executor or administrator of the deceased sister had been appointed. The Special Term made no findings under the plea of defect of parties, but dismissed the complaint on the ground that the assignment of the mortgage was void. The General Term reversed the judgment and ordered a new trial without passing upon the question as to parties. Defendants appealed from the order giving the required stipulation. *Held*, that an order of affirmance for judgment absolute on the stipulation was proper. *Id.*
3. Defendant F., being the owner of a bond, conditioned for the payment of \$4,000 in \$100 annual payments, secured by mortgage, assigned them to plaintiff, indorsing on the mortgage a guaranty of payment according to its terms until the same should be reduced to \$3,000. The mortgage provided that the mortgagor should keep the buildings on the premises insured for the benefit of the mortgagee to the amount of \$1,000. Such an insurance was obtained. Subsequent to the assignment the

buildings were burned; \$1,484 was paid on the insurance and received by plaintiff. In an action to foreclose the mortgage a judgment for any deficiency was asked against F. upon his guaranty, to the extent of his liability thereon. *Held*, that the guaranty contemplated a reduction of the mortgage by payments thereon made in the usual course according to its terms; that insurance money received was not such a payment, it being simply a substitution *pro tanto* for the mortgaged property and a reduction of the mortgage by application thereon of the substituted fund; and, therefore, that plaintiff was entitled to the relief sought. *Smith v. Ferris*. 495

See MORTGAGE.

FOREIGN CORPORATIONS.

1. The legislature has power to authorize a foreign railroad corporation, lawfully operating its road within this state, to acquire by condemnation additional lands required for railroad purposes. *N. Y., N. H. & H. R. R. Co. v. Welsh*. 411
2. Such a corporation, in the contemplation of the statutes of the state and to the extent of its existence and operation here, is *pro hac vice* a state corporation. *Id.*
3. The fact that promoters engaged in organizing a corporation in another state deceived the authorities of that state as to their real purpose in forming the corporation, and so procured them to file the necessary papers and take the necessary steps to give the organization a corporate existence, is no defense to an action brought by the corporation in this state upon an indebtedness to the corporation. *U. S. Vinegar Co. v. Schlegel*. 537
4. So long as the corporation exists and is recognized by the state of its origin it is entitled to the same recognition here, unless it appears that it was formed for purposes illegal here, or was doing acts prohibited by the laws of this state to its own citizens and corporations. *Id.*

5. In an action brought by a corporation of another state to recover upon a subscription to its capital stock one defense was that plaintiff was incorporated for an illegal purpose. There was no proof of any corporate act pointing to any illegal purpose or object. The proof on that point was a printed prospectus issued by certain promoters of the company, a blank form of contract to be used, and numerous acts and declarations by them before the corporation was created. It did not appear that these were ever adopted or acted upon by the corporation. *Held*, that the defense was not sustained; that such documents, acts and declarations could not be used to defeat contracts made with or obligations incurred by an individual to the corporation; and so, it was immaterial whether they furnished evidence of any illegal purpose by any one. *Id.*

FORMER ADJUDICATION.

1. Plaintiff, who, as his complaint stated, sued as a stockholder of a mining corporation in his own behalf and that of others similarly situated, sought to set aside and annul various transactions relating to and conveyances of property alleged to belong to the corporation, on the ground that said conveyances were fraudulent, and intended to injure and defraud plaintiff and others similarly situated. Among the alleged fraudulent transactions was the foreclosure of a mortgage executed by the company. The complaint alleged that in the foreclosure suit the corporation and the trustee for the mortgage bondholders were made defendants, and appeared and answered, setting forth the same matters as were set forth in the complaint herein, and the same issues were presented in that action as in this; those issues were litigated in that action and determined against the defendants. No allegations of collusion or other grounds which would give a court of equity jurisdiction to set aside the judgment were made against it. *Held*, that plaintiff was estopped by

said judgment; that plaintiff's right of action was a derivative one, he suing not primarily in his own right, but in that of the corporation, and so any defense which defendants would have if the corporation was plaintiff might be interposed against the stockholder. *Alexander v. Donohoe.* 203

2. The complaint alleged that prior to the formation of said corporation the property was held by trustees, who had issued trust certificates, and who subsequently conveyed to another corporation; that plaintiff held certain of said certificates, which, more than twelve years before the commencement of this action, he exchanged for stock of a corporation, and subsequently exchanged said stock for the stock of the corporation as a stockholder of which he sued, to which the property had been transferred. *Held*, that plaintiff could not, at least until he had repudiated the exchange as void, claim as *cestui que trust*, and so escape the bar of the foreclosure judgment; that even if not bound to rescind and to offer to surrender his stock, and demand to be reinstated in his position as a certificate holder before the commencement of his action, or in his complaint, he was at least bound to do so on the trial, and having failed so to do could only claim as stockholder, and was bound by the foreclosure judgment. *Id.*

3. In an action under the General Manufacturing Act (§ 18, chap. 40, Laws of 1848) to enforce the liability imposed by the act upon a stockholder of an insolvent corporation, to excuse the non-performance of the condition precedent to such liability, *i. e.*, the recovery of a judgment against the corporation and the return of an execution issued thereon unsatisfied, plaintiff produced a record of a judgment in an action in the Supreme Court, brought by a judgment creditor of the corporation to sequester its property and for the appointment of a receiver. The complaint in that action alleged the recovery of a

judgment against the corporation in the Auburn City Court, and the issue and return of an execution thereon unsatisfied. The judgment granted the relief sought, and forbade creditors from suing the company. The corporation was not located in said city. Defendant claimed that the judgment was void for want of jurisdiction, and so the injunction was a nullity and might have been disregarded. *Held*, that, conceding the invalidity of the judgment, plaintiff was not bound to disregard it, and that the non-performance of the condition was excused; but, *held*, that the complaint in the former action presented a case over which the court had jurisdiction; that the question as to the validity of the City Court judgment was one of law for it to decide, and, although it erred in adjudging it to be valid, this was a judicial error, and the judgment of sequestration could not be attacked collaterally, but the mistake, if made, was available only on appeal or some direct review of the decision. *Hunting v. Blun.* 511

FRAUD.

1. A mere device of one party to a contract intended to shield him from the results of his own fraud practiced upon the other party cannot be the basis of an equitable estoppel. *Bridger v. Goldsmith.* 424
2. So, also, where one party to a contract has perpetrated a fraud upon the other by means of which the latter was induced to enter into the contract, he cannot be precluded from seeking redress by a provision in the contract purporting to grant to the former immunity against the consequences of any fraud. *Id.*
3. Defendant sold to plaintiff his business, the fixtures and other property in his store. The contract of sale was in writing, under seal and contained a clause to the effect that it was understood and agreed that defendant had made

no statements or representations for the purpose of inducing the sale, other than that he had been engaged in the business since 1867. In an action to set aside the sale and recover the consideration paid on the ground that plaintiff was induced to purchase by false and fraudulent representations as to the character of the property, the extent of the business and the income derived therefrom, it appeared that after the negotiations had been completed and the agreement drawn, the clause specified was inserted at the request of defendant. *Held*, that the provision was not a covenant but simply a statement in the nature of a certificate as to a fact; and that plaintiff was not precluded thereby from showing the fraud and obtaining relief therefrom. *Id.*

4. Plaintiff's complaint alleged in substance that he owned stock of a corporation; that another stockholder offered to purchase his stock, making two offers, one \$80 per share, the other \$50 cash per share, with the right to another \$50 in January, 1894, in case the company should in the meanwhile have paid dividends of ten per cent for 1893. Plaintiff advised defendants, who were directors of the corporation, of these offers, and asked them as to the condition of the company that he might determine which one to accept; that they, knowing the facts, for the purpose of deceiving plaintiff and making him believe that the business of the company was flourishing, made statements set forth in regard to its condition, the amount of stock paid in, etc., which they knew to be false, and advised him not to sell his stock at less than par; that relying on these statements he accepted the offer last mentioned; that the company was at the time insolvent and declared no dividends for 1893, and so plaintiff received but the \$50. Upon demurrer to the complaint, *held*, that it set forth facts sufficient to establish a legal fraud and damages resulting therefrom, to recover which an action was maintainable. *Rothmiller v. Stein.* 581

5. Defendants claimed that as the complaint alleged the company was insolvent at the time of the sale of the stock, if they had told plaintiff the truth he would himself have been guilty of fraud in making a sale without communicating this fact to the purchaser, and if he had disclosed it a sale would not have been made. *Held*, untenable; that if defendants had informed plaintiff that the company was insolvent he would have been under no legal obligation to volunteer the information to another stockholder offering to purchase his stock. *Id.*

6. The maxim of *caveat emptor* as a general rule applies to sales of goods, and unless there is some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, the vendee is bound by the sale, notwithstanding the existence of extrinsic defects, materially affecting its value, known to the vendor and unknown to the vendee. *Id.*

7. The exception to this general rule stated and the authorities upon the subject collated. *Id.*

8. *It seems*, that while the law courts will not permit the recovery of damages against a vendor in a case coming under the general rule, because of mere concealment of a fact, yet, if the vendee refused to complete the contract because of the concealment of a material fact, equity will refuse to compel him to do so, as it only compels specific performance of a contract which is fair and open and in regard to which all material facts known to each have been communicated to the other. *Id.*

9. In regard to a business corporation engaged in carrying on its business, the mere fact that it is temporarily insolvent is not of that kind of materiality as excepts a sale of its stock by one who had knowledge of this fact, but did not disclose it to the purchaser, from the general rule of *caveat emptor*. *Id.*

10. The complaint alleged that the insolvency of the corporation arose

from the fact that defendants had failed to pay in \$10,000 of the capital stock subscribed for by them and which they had included in the \$20,000 of stock certified by them to have been paid in, coupled with the fact that they had grossly mismanaged the affairs of the company and squandered its money in paying large salaries. It did not appear that defendants were unable to pay, or that if they paid for their stock and managed the business properly, the company would not be enabled to continue its business profitably. *Held*, that it could not be said, as matter of law, that if plaintiff had communicated the facts to the intending purchaser he would not have made the purchase. *Id.*

GUARANTY.

Defendant F., being the owner of a bond, conditioned for the payment of \$4,000 in \$100 annual payments, secured by mortgage, assigned them to plaintiff, indorsing on the mortgage a guaranty of payment according to its terms until the same should be reduced to \$3,000. The mortgage provided that the mortgagor should keep the buildings on the premises insured for the benefit of the mortgagee to the amount of \$1,000. Such an insurance was obtained. Subsequent to the assignment the buildings were burned; \$1,434 was paid on the insurance and received by plaintiff. In an action to foreclose the mortgage a judgment for any deficiency was asked against F. upon his guaranty, to the extent of his liability thereon. *Held*, that the guaranty contemplated a reduction of the mortgage by payments thereon made in the usual course according to its terms; that insurance money received was not such a payment, it being simply a substitution *pro tanto* for the mortgaged property and a reduction of the mortgage by application thereon of the substituted fund; and, therefore, that plaintiff was entitled to the relief sought. *Smith v. Ferris*. 495

HIGHWAYS.

1. The state can neither itself appropriate to its own special, continu-

ous and exclusive use, nor can it authorize a corporation to so appropriate, any portion of a rural public highway, by setting up poles therein for the purpose of supporting telegraph or telephone wires. *Hels v. Am. Tel. & Tel. Co.* 188

2. The question as to the legality of such a use is not affected by the fact that the legislature by statutory enactments has manifested its belief in the existence of such a right, or by the fact that adjoining owners have generally acquiesced in such a use. *Id.*

3. Where, therefore, a telegraph and telephone company, organized under the laws of this state (Chap. 265, Laws of 1848, as amended by chap. 471, Laws of 1853), had, without the consent of an adjoining owner, who owned the fee of a highway, and without having acquired the right by condemnation proceedings, erected its poles in the highway and strung wires thereon for the purposes of its business, *held*, that such a use of the highway was unlawful; and that an action of ejectment was maintainable against it. *Id.*

4. In laying out a highway said commissioners exercise a special and limited jurisdiction, and while it may be presumed, until the contrary appears, that they acted legally, their acts may be impeached by showing that they exceeded their powers. *Beardslee v. Dolge*. 160

5. The provision of that article of the Transportation Corporations Act relating to water works corporations (Art. 7, § 2, chap. 586, Laws of 1890) which authorizes such corporations when they have obtained the permit required by the article (§ 80) "to lay their water pipes in any street * * * of an adjoining town or village," is not limited to cases where an adjoining town or village intervenes between the source of supply and the town or village to be supplied, and it is necessary, in order to carry the water to the village or town granting the permit, to lay the pipes in the streets

of the adjoining town or village; but the authority may be exercised by such a corporation whenever it is necessary to lay the pipes in those streets in order to effectually and properly execute the purpose for which it was created. *Village of Pelham Manor v. N. R. Water Co.* 532

6. In an action to restrain defendant, a water works company organized to supply a village adjoining plaintiff, from using one of plaintiff's streets in which defendant had laid its pipes without plaintiff's consent, it appeared that defendant laid its pipes in the street for the purpose of connecting two of its mains which terminated in "dead ends" near the boundary line of the two villages; this connection completed the circuit, added greatly to the pressure, and furnished running instead of stagnant water. The court found that in order to perform the purpose of its incorporation it was necessary for defendant to lay its pipes in the street in question. *Held*, that such a use of the street was within the scope of defendant's authority; and so, that the action was not maintainable. *Id.*

HUSBAND AND WIFE.

1. The position of a wife, in respect to her husband's property, is limited by the Revised Statutes, and save as brought within those limitations she is without the right to assert any claim to it. *Phelps v. Phelps.* 197
2. To entitle a wife to dower the husband must be seized either in fact or in law of a present freehold in the premises as well as an estate of inheritance. *Id.*
3. Such a seizin cannot be predicated with respect to lands purchased with the moneys of the husband, but not conveyed or agreed to be conveyed to him. *Id.*
4. Plaintiff's complaint alleged in substance that she was the wife of defendant, who, with intent to defraud her of her dower rights in his real estate, has purchased

various pieces of land, the title to which he caused to be taken in the name of L. under a written agreement with the latter that defendant "should receive all the benefit of, and have control of said property;" that defendant did exercise full possession and control of the same, and when sold, L., pursuant to the agreement, executed conveyances to *bona fide* purchasers having no notice of plaintiff's interest, defendant receiving the purchase money; that all of the land so purchased except one piece had been thus sold and conveyed. Plaintiff asked for a judgment adjudging the proceeds of such sales to be "still real estate and that this plaintiff has an inchoate right of dower in the same," and that the piece unconveyed be adjudged subject to her right of dower. *Held*, that the complaint did not set forth a cause of action; and so, that the overruling of a demurrer thereto was error. *Id.*

5. Plaintiff and the three defendants were the children and only heirs at law of P., who died intestate, owning a farm of 162 acres. In an action for partition defendants claimed that P. in his lifetime conveyed to plaintiff's wife fifty-nine acres, then a part of the farm, three absolutely and the remainder subject to a life estate reserved by the grantor; that such conveyance was intended by P. as an advancement and as and for plaintiff's share in his father's real estate, and was accepted by the wife, with knowledge of such intent, and that plaintiff knew and acquiesced in the conveyance for such purpose. *Held*, that parol evidence was competent to show that said deed was intended as an advancement to plaintiff; also that such an advancement could be made by the conveyance to the wife; but that it was incumbent on defendants to establish by satisfactory evidence that said conveyance was in fact made as an advancement. *Palmer v. Culbertson.* 213
6. In an action by a husband to recover damages resulting from a personal injury to his wife, alleged

to have been caused by defendant's negligence, the evidence tended to show that in consequence of the injury, the wife had a miscarriage. The court permitted the jury to consider and include in their verdict "any damages arising from the injury and resulting in depriving the plaintiff of prospective offspring." *Held*, error. *Butler v. Manhattan R. Co.* 417

7. The rule that where an agreement is made between parties standing in a confidential relation, or in a relation which gives to one party great influence over the other, and the agreement is to the advantage of the party in whom the confidence is reposed or whose influence is the dominant one, and to the detriment of the other party, the former will not be permitted to enforce the agreement unless it appears that he acted in the utmost good faith and that disclosure was made of all the material facts, or that the other party acted with a clear comprehension of the object and effect of the agreement, applies in favor of a wife in respect to an ante-nuptial contract, and the courts will regard with rigid scrutiny such a contract where it deprives her of any prospective interest in the estate of her intended husband, and especially where no provision is made therein for her support in case she survives him. *Graham v. Graham.* 578

8. In an action by the wife to set aside an ante-nuptial agreement, by the terms of which she surrendered all claim to dower, it appeared indisputably that defendant at the time the agreement was made owned real estate of the value of \$100,000; that the relinquishment of dower was not a condition of the engagement of marriage; that there was no negotiation between the parties on that subject before they met and executed the agreement; that defendant then stated that he wanted it arranged so that he could buy and sell real estate without interference from her, but did not disclose to her that this would mean a relinquishment of her dower

right; that no consideration was paid for the surrender, and that she acted without the aid of counsel. *Held*, that the General Term properly reversed on the facts a judgment of Special Term in favor of defendant; and that plaintiff was entitled to the relief sought. *Id.*

— *As to how right of husband as tenant by the curtesy is to be enforced.*
See Harvey v. Brisin. 151

INDICTMENT.

An indictment charging the presentation to a fire insurance company of a false and fraudulent claim for alleged loss by fire of property insured in several companies, alleged the service of proofs of loss, which were set forth; that the total loss was not the sum asserted in the proofs presented; that the particular claim made against the company complainant was not justly due, and that both claims were false and fraudulent to the knowledge of the defendant, and were feloniously presented in violation of the statute. *Held*, that this was a sufficient statement of the facts. *People v. Spiegel.* 107

INJUNCTION.

1. The court has no power, in a proceeding under the Code of Civil Procedure for the voluntary dissolution of a corporation, to restrain creditors of the corporation from disposing of its bonds, held as collateral to loans under lawful contracts, empowering them to sell. *In re Binghamton G. E. Co.* 261
2. Where, therefore, an order in such a proceeding appointing a temporary receiver, contained a clause restraining creditors of the corporation from foreclosing or selling its bonds pledged as collateral, *held*, that the order was properly modified on motion of a creditor who had prior to the institution of the proceeding received bonds of the corporation as collateral security for money loaned, so as not to restrain or prohibit said

creditor from foreclosing or selling said bonds, as authorized by the contract under which the bonds were held. *Id.*

3. The parties to this action entered into a contract by which plaintiff agreed to pay specified royalties in monthly installments for the use of a patented invention. Plaintiff paid the royalties for several years, and then refused to make further payments, on the ground that it was induced to enter into the contract by fraud. Defendant commenced three successive actions to recover installments falling due. Plaintiff answered setting up the alleged fraud, and asking to have the contract declared void because thereof. These actions were consolidated. The consolidated action was tried, resulting in a judgment for defendant. Plaintiff appealed, giving an undertaking securing the judgment. Defendant thereafter commenced another action to recover royalties, setting up the judgment so obtained for the purpose of estopping plaintiff from showing the fraud. To prevent the issuing of an attachment in that action plaintiff gave a bond to secure any judgment obtained. Plaintiff commenced this action, setting forth these facts and that defendant intended to commence successive actions as successive installments fell due, and prayed for an injunction restraining defendant, pending the appeal, from prosecuting the action in the Common Pleas, and from bringing other actions for royalties accruing. An order granting a preliminary injunction was affirmed by the General Term on condition that plaintiff give a bond to pay any judgment recovered in the Common Pleas, and to pay all royalties accruing until a final decision in the consolidated action on appeal to this court in case the judgment was affirmed, or the appeal dismissed, and also stipulates that in such case judgment might forthwith be entered, and that no defense would thereafter be interposed to any action to recover royalties. Defendant is substantially irresponsible. *Held*, that the court had jurisdiction of the action and

to grant the injunction, and that the temporary injunction was properly granted upon the terms specified; also that the exercise of its discretion by the court below was not reviewable here. *N. & N. B. Hosiery Co. v. Arnold.* 265

4. Defendant, who, in February, 1888, was carrying on the business of baker and confectioner in Little Falls, in that year sold the business, its good will and the property in his place of business to F., the husband of plaintiff, agreeing that he would not, for the period of five years from May first of that year, carry on that business in said village. F. carried on the business until November 10, 1889; he had given a chattel mortgage on a portion of the property, and on November 9, 1889, he gave a bill of sale to the mortgagees of all the property connected with the business; they, on the next day, by virtue of the mortgage and bill of sale, took possession of the property, closed the store and kept it closed until November nineteenth, when plaintiff, her husband acting as her agent, purchased the interests of said mortgagees, took possession, re-opened the store and thereafter carried on the business. Immediately prior to such purchase, plaintiff, with her husband, agreed that she would furnish the money to make the purchase and that he would take charge of and carry on the business in her name, the family to be supported out of it. On May 25, 1891, F., by an instrument in writing indorsed on the contract between him and defendant, in form transferred to plaintiff, without any actual consideration paid, all his interest in the contract and the covenants therein, the business formerly carried on by him and the good will. In December, 1890, defendant, without consent of plaintiff or her husband, commenced carrying on a similar bakery and confectionery business in said village. *Held*, that an action was maintainable by plaintiff to restrain defendant from carrying on such business and for damages. *Francisco v. Smith.* 488

INSANE PERSONS.

1. An insane person is liable for his torts the same as a sane person, except for those torts in which malice and, therefore, intention, is a necessary ingredient. *Williams v. Hays*. 442

2. In respect to this liability there is no distinction between torts of non-feasance and of misfeasance, and so an insane person is liable for injuries caused by his tortious negligence, and so far as this liability is concerned, is held to the same degree of care and diligence as a person of sound mind. *Id.*

3. In an action to recover for the loss of a vessel, alleged to have been caused by defendant's negligence, these facts appeared: Defendant, who was one of several joint owners of the vessel, he owning a minority interest, was sailing her under a contract with his co-owners as above specified; she encountered storms, and defendant for more than two days was constantly on duty; then becoming exhausted he went to his cabin, leaving the vessel in charge of the mate and crew. The mate found the rudder broken and useless; he caused defendant to come on deck, but the latter refused to believe the vessel was in any trouble and refused the help of tugs whose services were offered, the masters of which told him the vessel was drifting on shore. She did drift on shore in the daytime without any effort on the part of defendant or any of his crew to save her and she became a total loss. Defendant testified that from the time he came into his cabin until he found himself on shore he was unconscious and knew nothing that had occurred. The case was submitted to the jury on the theory that defendant, if sane, was guilty of negligence, but if insane was not responsible for the loss. *Held*, error; that, at least, unless it appeared that defendant had become insane solely on account of his efforts to save the vessel during the storm, he was chargeable with the consequences of his negligence. *Id.*

4. As to whether, even in such a case, he would not be liable for the neg-

ligence of his servants, the mate and crew, *quære*. *Id.*

5. The authorities on the subject of the liability of insane persons for torts collated. *Id.*

INSURANCE (FIRE).

1. The stipulations of a fire insurance policy which relate to the procedure merely in case of loss are to be reasonably, not rigidly, construed. *Paltrovitch v. Phoenix Ins. Co.* 78

2. A policy of fire insurance contained a provision that in case of loss a certificate made by a magistrate or notary "living nearest the place of the fire" shall be furnished by the insured if required. A loss having occurred, the insured furnished, with the proofs of loss, a certificate of a notary, substantially in the form prescribed. The proofs of loss were kept by the company for twenty-three days and were then returned with a notice that the company required a certificate from the notary "living nearest the place of the fire," and that the one sent would not be accepted as a compliance with that requirement. No name of any notary living nearer than the one who made the certificate was given and no statement that there was any. In an action upon the policy, it appeared that there were three notaries who lived nearer, but each of them had his office and transacted his official business at a much greater distance. Where they boarded and slept they had no signs, and there was nothing to indicate their presence. Plaintiff was unaware of their proximity, and took the nearest notary he could find, whose office and notarial sign and residence were at the same place. *Held*, that the phrase quoted should not be confined entirely to the place where the notary slept and ate, but should take account of the place where he lived officially and to which by some public sign he invites those who do business with him; and that in any event, good faith required of the defendant in

raising the objection to give the name and address of a notary living nearer, and not having done so, the jury were justified in concluding that it did not in reality require the certificate for any practical or beneficial purpose, but had waived it as an essential condition. *Id.*

8. In an action upon a policy of fire insurance the complaint alleged the issuing of the policy, which by its terms insured the property for a term beginning February 1, 1891; and that the property was destroyed by fire. The answer set up as a counterclaim that the policy was issued by mistake; that the agreement of the parties and the intention was to renew another policy, which expired February 17, 1891, the renewal not to take effect until the expiration of the original policy. Defendant asked that the policy be reformed so as to take effect only from February seventeenth. No reply was served. On the trial defendant claimed that to put in issue the facts stated as a counterclaim a reply was necessary, and, in the absence of one, they were admitted. *Held*, untenable; that the alleged counterclaim was not such, but only a defense, as it simply amounted to a denial of the making of the contract alleged or of any liability thereon; that it could not be turned into an equitable counterclaim by asking a reformation of the contract; that any such relief was needless, as proof of the facts pleaded would disprove and defeat plaintiff's claim. *Walker v. Am. Cent. Ins. Co.* 167

4. The corporation defendant issued to plaintiff a policy of fire insurance on certain property. Defendant E. held mortgages on the property and was insured as mortgagee in the same policy, as his mortgage interest might appear. The policy contained provisions declaring it void in case the insured, without the consent of the company, procured other insurance or in case he permitted foreclosure proceedings to be commenced. In case of other insurance it was provided that the company should be

liable for no greater proportion of the loss than the amount insured by the policy bore to the whole amount of insurance. The policy contained a "mortgage clause" to the effect that the insurance of E.'s interest should not be invalidated by any act or neglect of the mortgagor or owner of the property or by any foreclosure or other proceedings or notice of sale relating to the property; but that in case the company shall pay the mortgagee any loss, and shall claim that as to the mortgagor or owner no liability therefore existed, it, to the extent of such payment, should be subrogated to the rights of the mortgagee, or at its option may pay the mortgage debt and receive an assignment; no subrogation, however, to impair the right of the mortgagee to receive the full amount of his claim. During the term of the policy E. commenced an action to foreclose his mortgages, pending which a fire occurred. Judgment of foreclosure and sale was rendered, under which the property was sold, leaving a deficiency to more than the amount of the insurance. In an action upon the policy the insurance company claimed that E. having by his foreclosure and sale put it out of his power to subrogate, could not recover. *Held*, untenable; that while the commencement of the foreclosure suit terminated plaintiff's interest under the policy, the insurance of E.'s interest was separate and distinct, and he took the same benefit as if he had received a separate policy, free from the conditions imposed upon the plaintiff; that E., therefore, violated no contract when he commenced the foreclosure, nor was he bound to stay the proceedings when the fire occurred, accept payment of the amount of insurance, and then assign to the extent of such payment his rights in the mortgages; but that as the subrogation agreement was upon condition that subrogation should not impair the mortgagee's right to recover the full amount of his claims secured by the mortgages, unless full payment was made, he had the right to proceed with the foreclosure and sell the premises. *Eddy v. London Assurance Corp.* 311

6. Plaintiff, without consent of the insurers, obtained other insurance upon the property; this was done without the consent of E., and his interest was not insured. It was claimed by the company that in arriving at the proportion of the loss to be paid to E. such other insurance should be reckoned as part of the insurance on the property. *Held*, untenable. *Id.*

6. In other policies the mortgagee clause contained the provision that the insurers would be liable only in proportion to the whole amount of insurance on the property issued to or held by any party having an insurable interest in the property as owner, mortgagee or otherwise. *Held*, that the meaning of this provision, taking into consideration the other provision that the insurance of the mortgagee should not be invalidated by any act or neglect of the owner, was that the insurance which should diminish or impair the right of the mortgagee to recover for his loss must be one issued upon his interest or to which he had consented, and so, his insurance could not be diminished by insurance without his assent or knowledge which did not include his interest. *Id.*

7. A policy of insurance contained a clause declaring that "this policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or wind storm)." In an action on the policy plaintiff's evidence was to the effect that the buildings insured were struck by lightning, and that immediately thereafter a high wind came up; it also appeared that part of the damage done was due to the wind. The court charged the jury in substance, among other things, that if they found that the buildings were struck by lightning, and this was the primary cause of the loss, plaintiff was entitled to recover the whole loss, although the wind increased the damage. The court also refused to charge that "the jury must strictly confine their verdict to the actual damage done by the lightning, and cannot give

a verdict for the damage done by the wind." *Held*, error; that under the policy the recovery should have been limited to the direct loss or damage done by the lightning. *Beakes v. Phoenix Ins. Co.* 402

INSURANCE (MARINE).

Defendant issued an open policy of marine insurance to cover shipments of cotton from ports in the United States to ports in Europe. By the terms of the policy the adventure in each case began immediately upon the loading and continued until the safe landing of the goods at the specified port of destination. The assured was authorized to issue certificates, signed by defendant's manager, certifying that the bales of cotton mentioned therein were covered by the policy. On the margin of the policy was written a clause stating that it "covers all risks at and from the port of destination to the final destination of the cotton." A shipment of cotton was made at Norfolk, Va., the final destination of which was Liverpool, which was insured under the policy. The cotton arrived safely at Liverpool, but on the night following its discharge, while upon the dock, it was damaged by fire. In an action upon the policy, *held*, that defendant was not liable; that the marginal clause was intended to apply in cases where the port of destination of the vessel was not the final destination of the cotton, so as to cover the shipment until it reached such final destination, but when this was reached and the cotton safely landed, the policy expired. *Beddall v. British & F. M. Ins. Co.* 94

INTOXICATION.

1. Under the provision of the Penal Code (§ 22) declaring that "whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive or intent with which he

committed the act," where it appears upon the trial of an indictment for murder in the first degree that the defendant was intoxicated when he committed the homicide, the jury should be instructed that if the intoxication had extended so far in its effects that the necessary intent, deliberation and premeditation were absent, the fact of intoxication must be considered, and a verdict rendered in accordance therewith. In such a case the intoxication need not be to the extent of depriving the accused of all power of volition or of all ability to form an intent. *People v. Leonardi*. 360

2. Upon the trial of an indictment for murder it appeared that the homicide was committed by defendant without provocation and without motive, and that he was very much intoxicated at the time. The court charged in substance that if defendant had intelligence enough to know right from wrong, that the act he committed was wrong, he was responsible; but if he was bereft of reason, sense and judgment, and acted without knowledge or intent as to the result of his acts, he was irresponsible, and that this was all the court would say as to the intoxication of defendant bearing upon his capacity to distinguish between right and wrong, but that it would speak thereafter upon the subject of intoxication as bearing upon the question of motive. Subsequently the court charged that if defendant was sober enough to know what he was about, that the act was wrong, then his intoxication and motive would both exist, and the one would not destroy the other; that he must be so completely intoxicated in order to be excused as to be destitute of the capacity to realize the wrongful nature of the act, that his acts were wholly aimless and without purpose. *Held*, error. *Id.*

3. One of the defenses interposed to an indictment for murder was insanity; after evidence had been given on the part of the defense as to the words and actions of defendant on an occasion specified,

which it was claimed were so strange and inexplicable as to indicate insanity, the prosecution was allowed to show that on that occasion defendant was intoxicated. *Held*, no error. *People v. Miles*. 383

JOINT OWNERS.

1. Where one of several joint owners of a vessel by contract with the others takes the vessel to sail it on shares, he to man her, to pay the crew, furnish supplies and have the absolute control and management thereof, he is in no sense the agent of his co-owners, but is the owner of the vessel *pro hac vice*. *Williams v. Hays*. 442

2. Where the vessel is lost through the negligence of such an owner, he is liable to his co-owners for the loss. *Id.*

JUDGMENT.

By the terms of a contract between plaintiff and defendants T. N. M. and D. M., said defendants procured from defendant C. M. Bank a certificate of deposit for \$5,000, a sum agreed upon as liquidated damages in case of non-performance on their part. The certificate was delivered to defendant F. to be delivered up by him on the joint order of plaintiff and T. N. M. In an action to recover the amount, it appeared that T. N. M. and D. M. wrongfully refused to carry out their contract, and that the former refused to sign a written order for the delivery of the draft to plaintiff. *Held*, that the proper form of judgment was a direction requiring the delivery of such an order; that upon receipt thereof, F. deliver the certificate to plaintiff, and that the bank, upon presentation and delivery thereof indorsed by plaintiff, pay to him the \$5,000; also, that T. N. M. and D. M. should be adjudged to pay interest on the amount from the time demand was made upon T. N. M. for the order and the costs of the action. *Pellus v. Motley*. 657

See FORMER ADJUDICATION.

JUDICIAL NOTICE.

1. *It seems*, the court may take judicial notice that the "diamond stack" and the "straight stack spark arresters" are in very general use upon the railroads of the country, and are both well-known systems for arresting sparks. *Frace v. N. Y., L. E. & W. R. R. Co.* 182
2. In an action against a railroad company to recover damages for property alleged to have been set on fire by sparks from one of defendant's engines, it appeared that the property destroyed was a barn and an hotel about forty feet distant therefrom. The barn first caught fire. The court charged that to justify a verdict including the value of the hotel the jury must find "that the same was destroyed by reason of the fire being communicated thereto directly from the engine, or without the assistance of other agencies. *Held*, no error. *Id.*
3. *It seems*, the doctrine of the case of *Ryan v. N. Y. C. & H. R. R. Co.* (85 N. Y. 210) is not to be extended beyond the precise facts appearing therein. *Id.*

JURISDICTION.

1. An official determination of a commissioner of highways as to a fact upon which his power to act depends is not conclusive, and if the fact does not exist, his decision will not establish jurisdiction. *Beardslee v. Dolge.* 180
2. An action to remove testamentary trustees, holding title to real estate under the trust, is a purely personal action, having no connection with the title, within the meaning of the provision of said Code (Subd. 1, § 263), giving to superior city courts jurisdiction in an action to procure a judgment affecting an estate or interest in real property or a chattel real. *Paget v. Stevens.* 172
3. The provision of said Code (Subd. 1, § 263), giving to said courts jurisdiction of an action

"brought by a resident of the city wherein the court is located against a natural person who is not a resident of the state," includes cases where a sole plaintiff or all of the plaintiffs are residents of the city; it does not give jurisdiction where one of two or more plaintiffs, who is not merely a formal, but an interested party is a non-resident. *Id.*

4. An action was brought in the Court of Common Pleas in and for the city and county of New York to remove two trustees of a trust created under a will, one of whom is and was at the commencement of the action and during the time mentioned in the complaint a resident of Massachusetts, and none of the acts complained of were done in this state. One of the plaintiffs, also a trustee, resides in the city of New York; the other plaintiff, a *cestui que trust*, resides in England. An order was made for the service of the summons on said non-resident trustee by publication. On motion to vacate the order, *held*, that said court had no jurisdiction; and so, a denial of the motion was error. *Id.*
5. The court has no power, in a proceeding under the Code of Civil Procedure for the voluntary dissolution of a corporation, to restrain creditors of the corporation from disposing of its bonds, held as collateral to loans under lawful contracts, empowering them to sell. *In re Binghamton G. E. Co.* 261
6. The proceeding is purely statutory and the restraining power of the court is such as is given by the Code (§ 2423). The equity power of the court does not extend to the sequestration of the property of a corporation by means of a receiver. *Id.*
7. The parties entered into a contract by which plaintiff agreed to pay specified royalties in monthly installments for the use of a patented invention. Plaintiff paid the royalties for several years, and then refused to make further payments, on the ground that it was induced to enter into the contract

by fraud. Defendant commenced three successive actions to recover installments falling due. Plaintiff answered setting up the alleged fraud, and asking to have the contract declared void because thereof. These actions were consolidated. The consolidated action was tried, resulting in a judgment for defendant. Plaintiff appealed, giving an undertaking securing the judgment. Defendant thereafter commenced another action to recover royalties, setting up the judgment so obtained for the purpose of estopping plaintiff from showing the fraud. To prevent the issuing of an attachment in that action plaintiff gave a bond to secure any judgment obtained. Plaintiff commenced this action, setting forth these facts and that defendant intended to commence successive actions as successive installments fell due, and prayed for an injunction restraining defendant, pending the appeal, from prosecuting the action in the Common Pleas, and from bringing other actions for royalties accruing. An order granting a preliminary injunction was affirmed by the General Term on condition that plaintiff give a bond to pay any judgment recovered in the Common Pleas, and to pay all royalties accruing until a final decision in the consolidated action on appeal to this court in case the judgment was affirmed, or the appeal dismissed, and also stipulates that in such case judgment might forthwith be entered, and that no defense would thereafter be interposed to any action to recover royalties. Defendant is substantially irresponsible. *Held*, that the court had jurisdiction of the action and to grant the injunction, and that the temporary injunction was properly granted upon the terms specified; also that the exercise of its discretion by the court below was not reviewable here. *N. & N. B. Hosiery Co. v. Arnold.* 265

8. The complaint in an equity action was dismissed on trial. On appeal the judgment was reversed. The order of General Term was affirmed on appeal to this court, and upon defendants' stipulation judgment

absolute was ordered for plaintiff, with costs (140 N. Y. 250). *Held*, that upon filing the remittitur, the Special Term had power to award costs and an extra allowance; that while under the order of affirmance the costs awarded were the costs in this court only, as the case was one where the costs and an extra allowance were in the discretion of the court below, it was proper for the court to award them in ordering final judgment. *Barnard v. Hall.* 339

JURY.

See CHALLENGE (OF JURORS).

LANDLORD AND TENANT.

See LEASE.

LAW.

The complaint in an action brought by receivers of corporations alleged that each of the defendants had been a director of the corporation during a period stated. This showed that they had not all been directors for the same length of time or during the same period. The complaint then set forth various acts of negligence and wrong doing on the part of defendants, as directors, resulting in large losses to the corporation. A money judgment was asked against the defendants jointly for the full amount of loss claimed. There was no averment that an accounting was necessary to ascertain the damages, nor was it asserted that defendants were severally liable for separate and personal misconduct. On demurrer based upon the ground that different causes of action affecting different defendants had been improperly joined, *held*, that the action was to be regarded as one at law; and so, that the demurrer was well taken. *O'Brien v. Fitzgerald.* 377

LEASE.

1. A lease of a portion of a building in the city of New York con-

tained a provision to the effect that if, without fault of the lessee, the demised premises shall be damaged by fire, the latter shall continue to pay rent "only for such portion of the leased premises as he can reasonably occupy during the time required to make the necessary repairs, but if the building shall be so damaged or destroyed as in the judgment of" the lessor to require to be rebuilt, then the lease shall terminate and the premises be vacated by the lessee. The building was so damaged by fire as to render it wholly untenable during the period of repair. In an action to recover rent alleged to have accrued after the fire, *held*, that the lease provided simply for two contingencies, one such a destruction of the building as to require it to be rebuilt, the other an injury by fire admitting a partial occupancy, neither of which happened; that, therefore, the emergency contemplated by the act of 1860 (Chap. 845, Laws of 1860), and which did happen, *i. e.*, an injury by fire rendering the premises untenable, was not covered or provided for by the terms of the lease, and so, the statute applied and defendant was not liable. *N. Y. R. E. & B. Ins. Co. v. Motley.* 156

2. A lease to defendant of a building in the city of New York for a term which expired May 1, 1889, contained covenants on the part of the lessee against subletting or assigning; also, that at reasonable hours in the daytime he would permit the lessor or his agent to show the premises to such persons as they desired for the purpose of selling or leasing, and that he would permit the usual notice of "To let" to be posted on the premises, and to remain there without molestation. In an action to recover damages for breach of this covenant these facts appeared: Defendant sublet the premises to another for a portion of the term, who took possession; he refused to permit the posting of any notice, and refused entrance to any one desirous of looking at the house for the purpose of leasing or purchasing; after expiration of the

lease the house remained unoccupied and without being leased or sold until February 1, 1890, when it was leased for \$900 a year. Evidence was given that in May, 1889, the rental value was \$1,000; also tending to prove that directly in consequence of the violation of the covenants plaintiff suffered some loss of rent. The trial court held that the failure to rent could not, upon the evidence, be regarded as the natural or necessary consequence of the breach, and directed a judgment for nominal damages only. *Held*, error; that the covenants as to posting the notice and showing the premises, were included in the lease to aid the lessor in re-leasing at the expiration of the term with the least possible delay, and in inserting them the parties contemplated an amount of rent which might be lost by an inexcusable refusal to perform them, as a proper measure of damages; and that the evidence was sufficient to require the submission of the question to the jury as to whether there was a loss of rent because of the violation of the covenants. *U. S. Trust Co. v. O'Brien.* 284

LEAVE TO SUE.

Even where property is in the custody of the law it is a matter of course for the court, on application made in good faith, to permit suit to be brought by a third person claiming rights therein, and if action has been brought without such permission the court will, if the conduct of plaintiff has not been willful, permit the action to proceed. *Read v. Brayton.* 342

LEGACIES.

Where in an action of ejectment plaintiff claimed title under a devise in a will by which a legacy was given to one of the defendants and made chargeable upon the real estate in question, *held*, that the legacy did not constitute a counterclaim; also, that plaintiff was not required to demur to the answer setting it up as a counter-

claim in order to raise the question, nor did he, by replying, waive his right to take the objection. *Dinan v. Coneys.* 544

LEGISLATURE.

While the legislature may not destroy and confiscate the property and franchises of a corporation, it cannot be restricted in its grants of corporate franchises which are within constitutional limitations, save by its own express agreement, even though the consequences of such a grant may be to entail loss, if not ruin, upon existing corporations through rivalry and competition. *In re City of Brooklyn.* 596

LIENS.

1. Where a judgment was recovered in January, 1879, and execution was issued thereon in March, 1894, and upon return thereof unsatisfied an order was issued requiring defendant to appear and answer in supplementary proceedings, *held*, that a motion to vacate the order was improperly denied; that as under said Code (§ 1251) the lien of the judgment upon defendant's real estate and chattels real ceased after ten years, the execution was not effective to reach all the debtor's property so as to exhaust the legal remedy, and, as no steps had been taken to re-establish the lien, the proceedings were improperly instituted. *I. & T. Nat. Bank v. Quackenbush.* 567
2. A prior execution had been issued upon the judgment immediately after its rendition, which was returned unsatisfied. *Held*, that the right to maintain supplementary proceedings then accrued and became barred after the lapse of ten years, in the absence of some new proceedings to revive it, to which the debtor was a party. *Id.*

See CHATTEL MORTGAGE.
MORTGAGE.

LIMITATIONS (STATUTE OF).

1. Under the provisions of the Code of Civil Procedure (§ 2435) authorizing a judgment creditor to institute proceedings supplementary to execution "at any time within ten years after the return wholly or partly unsatisfied of an execution against property," an execution which is effective to exhaust the remedy at law is intended; and so, it is not enough that forms are observed by the return of an execution which is not effective to reach all of the debtor's property, and the right does not arise unless at the time of issuing the execution the creditor had a judgment which was a lien on the debtor's real estate and chattels real, so that the execution could reach them as well as his personal property. *I. & T. Nat. Bank v. Quackenbush.* 567
2. Where, therefore, a judgment was recovered in January, 1879, and execution was issued thereon in March, 1894, and upon return thereof unsatisfied an order was issued requiring defendant to appear and answer in supplementary proceedings, *held*, that a motion to vacate the order was improperly denied; that as under said Code (§ 1251) the lien of the judgment upon defendant's real estate and chattels real ceased after ten years, the execution was not effective to reach all the debtor's property so as to exhaust the legal remedy, and, as no steps had been taken to re-establish the lien, the proceedings were improperly instituted. *Id.*
3. A prior execution had been issued upon the judgment immediately after its rendition, which was returned unsatisfied. *Held*, that the right to maintain supplementary proceedings then accrued and became barred after the lapse of ten years, in the absence of some new proceedings to revive it, to which the debtor was a party. *Id.*

LOAN.

The acceptance of a draft by the drawee is no evidence of a loan

by him to the drawer. The drawee is presumably a debtor for the amount of the draft and payment of it a discharge of the debt. *Doyle v. English*. 556

MANDAMUS.

Where a plaintiff rightfully claims a preference on the trial calendar, and the defendant does not oppose the motion, but the same is denied by the courts, plaintiff's remedy is not by appeal but, *it seems*, by mandamus to compel the trial judge to do his duty. *Hays v. Consolidated Gas Co. N. Y.* 641

MANUFACTURING CORPORATIONS.

In an action under the General Manufacturing Act (§ 18, chap. 40, Laws of 1848) to enforce the liability imposed by the act upon a stockholder of an insolvent corporation, to excuse the non-performance of the condition precedent to such liability, *i. e.*, the recovery of a judgment against the corporation and the return of an execution issued thereon unsatisfied, plaintiff produced a record of a judgment in an action in the Supreme Court, brought by a judgment creditor of the corporation to sequester its property and for the appointment of a receiver. The complaint in that action alleged the recovery of a judgment against the corporation in the Auburn City Court, and the issue and return of an execution thereon unsatisfied. The judgment granted the relief sought, and forbade creditors from suing the company. The corporation was not located in said city. Defendant claimed that the judgment was void for want of jurisdiction, and so the injunction was a nullity and might have been disregarded. *Held*, that, conceding the invalidity of the judgment, plaintiff was not bound to disregard it, and that the non-performance of the condition was excused; but, *held*, that the complaint in the former action presented a case over which the court had jurisdiction; that the question

as to the validity of the City Court judgment was one of law for it to decide, and, although it erred in adjudging it to be valid, this was a judicial error, and the judgment of sequestration could not be attacked collaterally, but the mistake, if made, was available only on appeal or some direct review of the decision. *Hunting v. Bun*. 511

MASTER AND SERVANT.

Where by agreement between the parties, the compensation of plaintiff as salesman for defendant was to be a commission on sales, *held*, that plaintiff was entitled to commissions on orders for goods solicited and obtained by him, although the goods were not delivered by defendant until after plaintiff's discharge, and the commissions were by the agreement not payable until delivery. *Dibble v. Dimick*. 549

MORTGAGE.

F., in 1857, conveyed certain premises to two of her grandchildren, taking back a mortgage which was conditioned for the payment by the mortgagors to her of specified sums annually and that they should provide for her board, clothing and all things proper for her comfort and support during her life, and five years after her death that they should pay \$1,000 to M., a sister, and \$500 to E., a granddaughter of the mortgagor. This mortgage was soon after satisfied of record, and said mortgagors executed and delivered to F. another mortgage on the same premises, with substantially the same conditions save a slight alteration as to her clothing and support. Thereafter, up to the time of the death of F., there was a series of conveyances to and from F. and the grantees in the first deed or their wives, and of mortgages executed by them, containing substantially the same conditions except that in the later mortgages the condition as to the payments to M. and E. were omitted. These mortgages,

save the last one, were each satisfied by the mortgagee in their order. In an action to foreclose the mortgages containing the condition so omitted, wherein plaintiffs claimed as representatives of the interests of M. and E., the referee found that each subsequent mortgage was intended as a substitute for the preceding one and that F. received them upon the understanding and belief that the arrangement was testamentary in its character and that she retained possession and control of each mortgage until it was satisfied; also that neither M. nor E. had any knowledge or took any delivery of, or in any manner accepted or assented to any of the mortgages. *Held*, that no trusts in favor of M. and E. were created by the mortgages, but that the finding that the provisions for the payments to M. and E. were in their nature testamentary was proper, and so they were subject to alteration at any time by the assent of the parties to the mortgages. *Townsend v. Rackham*. 516

See CHATTEL MORTGAGE.
FORECLOSURE.

MOTIONS AND ORDERS.

The parties hereto stipulated that the action be discontinued upon terms specified, the order of discontinuance to be without prejudice to a motion for extra allowance, and if allowance be granted and not paid, that defendants could move to vacate the order of discontinuance *ex parte*. Upon this stipulation an order of discontinuance was entered which recited that plaintiff had complied with all terms "except to the extra allowance to be hereafter disposed of." An order of Special Term granting an extra allowance was reversed by the General Term without considering the merits, on the ground, as appears by its order, that the court had no power after discontinuance to grant an extra allowance. *Held*, error; that the parties had power to enter into the stipulation and pursuant to it the motion for extra allowance was regular, and

the General Term had power to review on the merits the order granting it. *H. B., M. & F. R. Co. v. Town Board Westchester*. 59

2. An order made in proceedings to punish for a criminal contempt may be reviewed by certiorari. *People ex rel. v. Forbes*. 219

3. Under the provisions of the act providing for rapid transit railways in certain cities (Chap. 4, Laws of 1891, as amended by chap. 102, Laws of 1892), which makes the authorization of the Supreme Court a prerequisite to the right of a bridge company to construct and operate an elevated railway as an approach to its bridge, in case of failure to obtain the consent of property owners, the power conferred upon the court is discretionary and exclusive, and its order refusing the authorization upon the merits, where no abuse of its discretion is shown, is not reviewable here. *In re E. R. Bridge Co.* 249

4. Commissioners appointed under the General Railroad Act (Chap. 140, Laws of 1850, as amended) in proceedings to condemn lands for railroad purposes, are judges of the law and the fact so far as relates to the compensation to be awarded to landowners. When their order has been confirmed and the order of confirmation has been affirmed by the General Term of the Supreme Court, no further appeal can be taken. *In re S. B. R. R. Co.* 253

5. The General Term may set aside and vacate the report for errors of law or of fact, and direct a new appraisal. In which case the second report "is final and conclusive on all the parties interested" (§ 18), except in case there is some irregularity in the proceedings affecting the jurisdiction of the commissioners, or fraud, mistake or accident of such a character as would authorize a court of equity to set aside a judgment, a report of a referee or an award of arbitrators. *Id.*

6. *It seems*, where a case is brought within these exceptions, the Su-

preme Court may, upon motion, set aside the report of the commissioners, and if it refuses so to do, upon undisputed facts, an appeal from its determination may be taken to this court. *Id.*

7. In an action for partition it was ordered that the issues of fact be tried at Circuit, and certain questions were framed to be answered by the jury. Trial was so had, the questions were answered by the jury, and upon written consent of all parties it was directed that the further hearing of the action should be before the court at Special Term. Upon such hearing, the court made findings and conclusions of law incorporating in the former the findings of the jury, and an interlocutory judgment was entered thereon. *Held*, that a motion for a new trial at General Term was properly dismissed; that the issues in the action were triable by a jury as matter of right (Code Civ. Pro. § 1544); that the facts found by the jury were binding upon the Special Term; and so, the trial was not by the court without a jury, within the meaning of the Code of Civil Procedure (§ 1001) authorizing a motion for a new trial after entry of an interlocutory judgment, where the decision "upon trial of an issue of fact by the court" directs such a judgment. *Bowen v. Sweeney*. 349

MUNICIPAL CORPORATIONS.

— *Where an elevated railroad corporation has voluntarily paid a percentage of its income to a municipal corporation for the use of its streets, the former cannot recover back the sums so paid although the municipality was not entitled to the same.*

See Mayor, etc., v. M. R. Co. 1

See BROOKLYN (CITY OF).
NEW YORK (CITY OF).

MURDER.

1. Upon the trial of an indictment for murder it appeared that the homicide was committed by defendant without provocation and without motive, and that he was

very much intoxicated at the time. The court charged in substance that if defendant had intelligence enough to know right from wrong, that the act he committed was wrong, he was responsible; but if he was bereft of reason, sense and judgment, and acted without knowledge or intent as to the result of his acts, he was irresponsible, and that this was all the court would say as to the intoxication of defendant bearing upon his capacity to distinguish between right and wrong, but that it would speak thereafter upon the subject of intoxication as bearing upon the question of motive. Subsequently the court charged that if defendant was sober enough to know what he was about, that the act was wrong, then his intoxication and motive would both exist, and the one would not destroy the other; that he must be so completely intoxicated in order to be excused as to be destitute of the capacity to realize the wrongful nature of the act, that his acts were wholly aimless and without purpose. *Held*, error. *People v. Leonard*. 360

2. Under the provision of the Penal Code defining murder in the first degree (§ 183), which includes the killing of a human being "by a person engaged in the commission of or attempt to commit a felony either upon or affecting the person killed, or otherwise," the word "otherwise" is not confined to felonies against property simply, but also includes a felony upon or against a person other than the one killed. *People v. Miles*. 383
3. Upon the trial of an indictment for murder, in advance of the selection of a jury, and before any of the panel had been examined, the parties, by permission of the court, elected to have all peremptory challenges as to jurors determined before the juror left the witness stand, and if accepted, that the final oath be at once administered. A juror was then called and sworn as to his qualification, after his examination by the prosecution, defendant's counsel asked if the juror was satisfactory to the People, to which the

district attorney replied : " We do not challenge him for bias nor for favor." Said counsel then asked the court to direct that the prosecution should at once accept or reject the juror, and exercise its right of peremptory challenge then, if at all ; this, the court refused. The juror was then examined by the prisoner's counsel, and, after his examination was concluded, the court called upon the district attorney to exercise his right of peremptory challenge ; he interposed none, and said counsel having expressed himself satisfied, the juror was sworn. *Held*, that the ruling of the court was not error ; that there was a full compliance with the provision of the Code of Criminal Procedure (§§ 335, 336) in reference to challenges. *Id.*

4. One of the defenses interposed was insanity ; after evidence had been given on the part of the defense as to the words and actions of defendant on an occasion specified, which it was claimed were so strange and inexplicable as to indicate insanity, the prosecution was allowed to show that on that occasion defendant was intoxicated. *Held*, no error. *Id.*

5. It appeared that the person killed was shot by defendant ; he, as a witness in his own behalf, testified that the fatal shot was fired, not at the deceased, but in the direction of another person. *Held*, that, assuming defendant, in an attempt to wound or kill such other person, by a false aim killed the deceased, it was murder in the first degree. *Id.*

NEGLIGENCE.

1. H., the owner of a lot adjoining that of plaintiff's, entered into a contract with defendants by which they agreed to build a house upon said lot and " to become answerable and accountable for any damages * * * to the property * * * of any neighbor * * * during the performance of said work." Defendants entered into a contract with D., by which the latter agreed to do the necessary excavation, he assuming " all responsibility for any loss or damage to persons or property " while engaged in the work, and to save defendants harmless therefrom. In blasting rock upon said lot, while D. was engaged in the performance of his contract, plaintiff's house was injured. In an action to recover damages the evidence tended to show that the damage was caused by the negligent manner in which D. conducted the work of blasting. The trial court charged the jury that in any event the defendants were liable. *Held*, error ; that defendants were not liable for negligence on the part of D. ; that if there was no negligence, and the injury was the inevitable result of the blasting, no one was liable, and if defendants' contract with H. was to be treated as a contract of indemnity, it imposed no liability, as H. was not liable ; that the clause referred to could not be considered as inserted for plaintiff's benefit, but even if so held, as she was not a party to the contract or in privity therewith, as to her it was without consideration and she could not enforce it. *French v. Viz.* 90
2. In an action to recover damages for the destruction of plaintiff's property by a fire alleged to have been kindled by sparks which escaped from an engine passing on defendant's road, it appeared that what is known as a " straight stack spark arrester " was used upon the engine, and the evidence was uncontradicted that this kind of spark arrester was in general use on many of the large railroads and on some was almost exclusively employed, and that it in fact arrested sparks as well as any kind that was known. The question was submitted by the trial court to the jury as to defendant's negligence in the adoption of a proper system or kind of spark arresters. *Held*, error. *Frace v. N. Y., L. E. & W. R. R. Co.* 182
3. A cause of action against a domestic business corporation for injuries caused by its negligence does not abate upon its dissolu-

- tion, but survives, and an action thereon is maintainable against the trustees holding the corporate property for the purposes of distribution. (§ 5, chap. 691, Laws of 1892; § 30, chap. 687, Laws of 1892.) *Manstaller v. Mills.* 898
4. In an action by a husband to recover damages resulting from a personal injury to his wife, alleged to have been caused by defendant's negligence, the evidence tended to show that in consequence of the injury, the wife had a miscarriage. The court permitted the jury to consider and include in their verdict "any damages arising from the injury and resulting in depriving the plaintiff of prospective offspring." *Held, error. Butler v. Manhattan R. Co.* 417
 5. An insane person is liable for injuries caused by his tortious negligence, and so far as this liability is concerned, is held to the same degree of care and diligence as a person of sound mind. *Williams v. Hays.* 442
 6. Where one of several joint owners of a vessel by contract with the others takes the vessel to sail it on shares, he to man her, to pay the crew, furnish supplies and have the absolute control and management thereof, he is in no sense agent of his co-owners, but is the owner of the vessel *pro hac vice*, and if the vessel is lost through his negligence, he is liable to his co-owners for the loss. *Id.*
 7. In an action to recover for the loss of a vessel, alleged to have been caused by defendant's negligence, these facts appeared: Defendant, who was one of several joint owners of the vessel, he owning a minority interest, was sailing her under a contract with his co-owners as above specified; she encountered storms, and defendant for more than two days was constantly on duty; then becoming exhausted he went to his cabin, leaving the vessel in charge of the mate and crew. The mate found the rudder broken and useless; he caused defendant to come on deck, but the latter refused to believe the vessel was in any trouble and refused the help of tugs whose services were offered, the masters of which told him the vessel was drifting on shore. She did drift on shore in the daytime without any effort on the part of defendant or any of his crew to save her and she became a total loss. Defendant testified that from the time he came into his cabin until he found himself on shore he was unconscious and knew nothing that had occurred. The case was submitted to the jury on the theory that defendant, if sane, was guilty of negligence, but if insane was not responsible for the loss, *Held, error; that, at least, unless it appeared that defendant had become insane solely on account of his efforts to save the vessel during the storm, he was chargeable with the consequences of his negligence. Id.*
 8. As to whether, even in such a case, he would not be liable for the negligence of his servants, the mate and crew, *quære. Id.*
- Where owner of property has contracted for the erection of building, and through negligence in construction a wall thereof falls, the contractor, not the owner, is liable for the damages.
See Negus v. Becker. 808

NEW TRIAL.

In an action for partition it was ordered that the issues of fact be tried at Circuit, and certain questions were framed to be answered by the jury. Trial was so had, the questions were answered by the jury, and upon written consent of all parties it was directed that the further hearing of the action should be before the court at Special Term. Upon such hearing, the court made findings and conclusions of law incorporating in the former the findings of the jury, and an interlocutory judgment was entered thereon. *Held*, that a motion for a new trial at General Term was properly dismissed; that the issues

in the action were triable by a jury as matter of right (Code Civ. Pro. § 1544); that the facts found by the jury were binding upon the Special Term; and so, the trial was not by the court without a jury, within the meaning of the Code of Civil Procedure (§ 1001) authorizing a motion for a new trial after entry of an interlocutory judgment, where the decision "upon trial of an issue of fact by the court" directs such a judgment. *Bowen v. Sweeney*. 349

NEW YORK (CITY OF).

1. Under the provision of the act of 1867 (Chap. 499, Laws of 1867) providing "for the construction of an experimental line of railway in the counties of New York and Westchester," which act authorized the W. S. & Y. P. R. Co. to construct an elevated railroad on the route therein specified, and provides (§ 9) that said company shall pay into the city of New York as a compensation for the use of its streets "five per cent of the net income of said railway" derived from passenger traffic, in such manner as the legislature may thereafter direct, the city was given no power to collect the specified percentage under the then general existing laws, and until future legislation fixing the manner of payment the company could not be placed in default for refusal to make payment. *Mayor, etc., v. Manhattan R. Co.* 1
2. The act of 1868 (Chap. 855, Laws of 1868) entitled "An act supplementary to chapter 489, Laws of 1867, and to provide for the collection and application of the revenue in the county of New York in certain cases," is invalid as it is violative of the provision of the Constitution (Art. 3, § 16) requiring that a private or local bill shall embrace but one subject which shall be expressed in its title. *Id.*
3. The different parts of said act are so interwoven and dependent one upon the other, that no portion thereof can be upheld after striking out the balance. *Id.*
4. The provisions, therefore, of said act which give direction as to the manner of payment of the percentage specified in the act of 1867, fall with it, and, standing alone, may not be referred to as the directions called for by said last-mentioned act. *Id.*
5. Where, however, it appeared that the corporation named in said act of 1868 availed itself of the extended time given to it by the act in which to construct an experimental section, and after such section had been approved as prescribed, proceeded to construct the railroad along the route provided in the act of 1867, with another form of motor, however, than that authorized by said act, as permitted by the act of 1868 (§ 1), and also availed itself of the permission given by said act to change its name (§ 5), and executed the bond required by it (§ 3); also that all the rights, powers, privileges and franchises of said company were sold on foreclosure of certain mortgages executed by it and the N. Y. E. R. R. Co. became vested therewith, and continued the construction and operation of the road; that the original company paid the five per cent in the manner prescribed by the act of 1868, and said N. Y. E. R. R. Co. after it acquired title also paid the same down to the passage of the act of 1875 (Chap. 595, Laws of 1875), which confirmed it in the possession and enjoyment of the property purchased, and gave to it certain other rights and privileges, and continued so to do thereafter until it leased the road to defendant, and that defendant continued to make payments of what it claimed to be five per cent of the rental, down to the commencement of this action for an accounting, *held*, that by virtue of these various acts on the part of defendant and its predecessors, and its acceptance of subsequent legislation based on the assumed validity of the act of 1868, there was a waiver of the defense that said act was unconstitutional. *Id.*
6. Under the provision of the Rapid Transit Act (§ 36, chap. 606, Laws

- of 1875), authorizing an elevated railway company, whose railway was then in operation, to construct connections with other railways, railroad depots or ferries, upon routes fixed by the commissioners, upon compliance with "the requirements and conditions imposed by said commissioners," the N. Y. E. R. Co., plaintiffs' lessor, constructed an extension of its route on the east side of the city, known as "the Third Avenue line," connecting with various ferries and railroads, upon routes fixed by the commissioners, and it and defendant have since operated the same and have paid what was claimed by them to be the percentage upon the income derived from the passenger traffic thereon. Said commissioners exacted from the N. Y. E. R. Co., as a condition precedent to their laying out any connecting routes, an agreement and consent to certain conditions imposed by them. *Held* (ANDREWS, Ch. J., GRAY and BARTLETT, JJ., dissenting), that as to such line no liability to pay said percentage existed; that the words of said provision of the Rapid Transit Act, permitting the construction of the connecting routes, "with all the privileges and with like effect as though the same had been a part of the original route," are simply a grant of power, upon conditions imposed by the commissioners, and do not carry with them the burdens imposed as to the original route; that defendant was not estopped from denying liability because of the payments previously made by it, and in the absence of some statutory liability, such as exists as to the original route under the act of 1867, it was not obliged to pay the percentage in future. *Id.*
7. Defendant set up as counter-claims sums paid by it as damages to abutting owners. *Held*, that there was no warranty in regard to the free use of the streets as against abutting owners, and so the counterclaims were not allowable. *Id.*
8. Also, *held*, defendant was not entitled to recover back the sums paid by it as percentage; that the payments were voluntary and plaintiff was entitled to retain the same. *Id.*
9. The provision of the New York Consolidation Act (Chap. 410, Laws of 1882) giving to the board of education "full control of the public schools, and the public school system of the city, subject only to the general statutes of the state upon education," does not give to that board power to impose a fine upon a teacher, either payable in money or by forfeiture of salary for a specified period, for violating the orders of the superintendent, or, *it seems*, for any misconduct or dereliction, in the absence of any by-law, rule or regulation known or assented to by the teacher providing for the imposition of such a fine. *People ex rel. v. Bd. Edn. N. Y. 62*
10. Under the provisions of the New York Consolidation Act (§ 273, chap. 410, Laws of 1882), declaring that "absence without leave of any member of the police force for five consecutive days shall be deemed and held to be a resignation, and the member so absent shall at the expiration of said period cease to be a member of the police force," the absence that will deprive a member of his place must be voluntary and intentional. *People ex rel. v. Martin. 407*
11. Where, therefore, a member of the force was dismissed for absence without leave for over five days, and it appeared that the absence was not his conscious act, but the result of temporary mental aberration, *held*, that the dismissal was error. *Id.*
12. Where lots in the city of New York were conveyed, bounded by a private street, laid out by the grantor, on his own land, but not laid down on the permanent maps of the city, *held*, that the purchasers became vested with the usual private easements in the street, and that the personal representatives of the grantor were estopped from raising the question that because of the fact that by statute the grantor was prohibited from laying out any streets in the

city save those laid down on said maps no such easements were created. *In re St. Nicholas Terrace.* 621

See COURT OF COMMON PLEAS.

OFFICE AND OFFICERS.

1. Where an individual sustains an injury by misfeasance or non-feasance of a public officer, an action lies in favor of the former against the latter. *Beardsley v. Dolge.* 160

2. A commissioner of highways is not a judicial officer in the sense that he is entitled to the common-law protection against a civil action for misconduct in office. *Id.*

3. In laying out a highway said commissioners exercise a special and limited jurisdiction, and while it may be presumed, until the contrary appears, that they acted legally, their acts may be impeached by showing that they exceeded their powers. *Id.*

4. An official determination of a commissioner as to a fact upon which his power to act depends is not conclusive, and if the fact does not exist, his decision will not establish jurisdiction. *Id.*

5. Where there is a want of authority in a public officer to hear and determine the subject-matter of a controversy, an adjudication upon the merits is a nullity, and does not estop even an assenting party. *Id.*

6. A commissioner of highways, in making a return to a writ of certiorari brought to review his proceedings, acts as a ministerial officer, and where in his return he makes material false statements, an action lies against him in favor of a party injured. *Id.*

7. The principle that where the court has in the administration of justice gained possession through its receiver or other officer of the property in litigation, it is deemed to be in the custody of the

law, and this cannot be disturbed without permission of the court, has no application to such a case; it applies only where there is a lawful possession under a lawful order of the court. *Read v. Brayton.* 342

8. *It seems*, a receiver or other officer of the court is not protected against replevin or other common-law action brought by a third person claiming paramount title to property in his possession as receiver. *Id.*

ORDERS (FOR MONEY OR GOODS).

1. Defendant and D. & F. entered into a contract by which the latter agreed to furnish all the material and labor required in the erection of two houses for the former; the agreed compensation to be paid in installments, the last installment to be paid when the work was completed. Plaintiff contracted with D. & F. to furnish a portion of the material required. After said parties had entered upon the performance of their respective contracts, D. & F. gave to plaintiff a written order requesting defendant to retain and pay to plaintiff from the last payment to be made to them under their contract with defendant, the sum of \$1,175. This order defendant accepted. In an action to recover the amount thereof it appeared that D. & F. failed to perform their contract. *Held*, that defendant's acceptance contemplated a performance of their contract by D. & F. so as to entitle them to the last payment, and defendant's obligation to plaintiff was that in case of such performance he would retain from such payment sufficient to pay plaintiff the amount specified. *Beardsley v. Cook.* 143

2. By the terms of the contract the payments were to be made upon certificate of the architect of performance. It also contained a provision that in case D. & F. failed to perform, defendant might complete the work and deduct the expense of completion from any balance unpaid upon the contract.

Defendant did complete the houses under this provision, but the amount expended by him in so doing was not found, the trial court refusing to make a finding on that subject, it holding that the builders had performed. *Held*, that defendant, when he elected to complete the contract instead of insisting upon performance by the builders, became liable to pay to plaintiff any part of the last payment which remained in his hands after deducting the expenses of completion; that the architect's certificate was not necessary, and that as to such remainder the acceptance of the order operated as an equitable assignment thereof, which could not be affected by payments to the builders in advance of the work or a mechanic's lien subsequently filed; but that plaintiff was bound to show an amount still remaining in defendant's hands over and above what he had expended, which was applicable to the payment of the order, and in the absence of such proof was not entitled to recover. *Id.*

PARTIES.

Where, after the commencement of an action by a corporation to recover an indebtedness, it becomes insolvent and a receiver of its assets is appointed, this does not affect the right of action; this may still be asserted by it and the action continued by the receiver without any substitution, so long as there is no dissolution of the corporation by judgment of the court. *U. S. Vinegar Co. v. Spamer.* 676

—Where owner of property has contracted for the erection of building and through negligence in construction a wall thereof falls, the contractor, not the owner, is liable for the damages.

See Negus v. Becker.

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PARTITION.

In an action for partition it was ordered that the issues of fact be tried at Circuit, and certain questions were framed to be answered

by the jury. Trial was so had, the questions were answered by the jury, and upon written consent of all parties it was directed that the further hearing of the action should be before the court at Special Term. Upon such hearing, the court made findings and conclusions of law incorporating in the former the findings of the jury, and an interlocutory judgment was entered thereon. *Held*, that a motion for a new trial at General Term was properly dismissed; that the issues in the action were triable by a jury as matter of right (Code Civ. Pro. § 1544); that the facts found by the jury were binding upon the Special Term; and so, the trial was not by the court without a jury, within the meaning of the Code of Civil Procedure (§ 1001) authorizing a motion for a new trial after entry of an interlocutory judgment, where the decision "upon trial of an issue of fact by the court" directs such a judgment. *Bowen v. Schoeney.* 349

PARTY WALLS.

1. A party wall is for the mutual convenience and benefit of the adjoining property owners, and the only restriction upon its use by either is that such use shall not be detrimental to the other. *Negus v. Becker.* 303
2. Plaintiff and K., being the owners of adjoining premises, entered into a contract by which the former agreed to erect upon their boundary line a brick wall with stone foundation, "of suitable size and dimensions to support a three-story brick building," K. to pay half the cost, and thereafter the wall to be owned jointly by the parties as a party wall. Plaintiff erected a two-story building and built the party wall of corresponding height. K. paid as required by the contract. K. conveyed his lot and interest in the wall to defendants, who entered into a contract with R. by which the latter agreed to erect a three-story brick building on their lot, R. to make use of the party wall and to carry it up another story. During

the process of construction that part of the wall which was being carried up fell over on the roof of plaintiff's building. In an action to recover the damages no negligence was charged to defendants or the contractor R.; the latter was not made a party, and there was no evidence that the falling of the wall was due to any negligence in construction, or that it was not in all respects proper for the purpose. The court directed a verdict for plaintiff. *Held*, error; that defendants had the legal right to increase the height of the wall to three stories, as contemplated by plaintiff's contract; and having provided for the work in a proper, lawful and usual way, and not having been shown guilty of any act contributing to the injury, were not liable. *Id.*

3. *It seems*, that if the fall of the wall was caused by some negligence in its construction, the party liable therefor was R., not defendants. *Id.*

PAYMENTS.

— *Where an elevated railroad corporation has voluntarily paid a percentage of its income to a municipal corporation for the use of its streets, the former cannot recover back the sums so paid, although the municipality was not entitled to the same.*

See Mayor, etc., v. M. R. R. Co. 1

PENAL CODE.

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| 22. | <i>People v. Leonardi.</i> | 860 |
| 29. | { <i>People v. McKane.</i> | 455 |
| 41. | | |
| 188. | <i>People v. Miles.</i> | 883 |

PLEADING.

1. Plaintiff's complaint alleged in substance these facts: B. died leaving a will by which she directed her executors to sell her real estate when it seemed to them best, and hold the proceeds in trust to pay over the income to her daughters M. and F. during their lives, and upon the death of either, the principal of her share to go to her children. M. died leaving three children. At that time the

power of sale had not been executed. Her three children executed a conveyance to G., their father, for life, of "so much of the interest and income mentioned and provided for" in said will "as would come and accrue to said children under and by virtue of the provisions contained in said will." The interest of G. in said land was subsequently sold on execution against him. Thereafter the remaining executor, one of them having been removed, sold and conveyed the land and received the proceeds. The purchaser at the execution sale conveyed to plaintiff all his interest in the real estate, the income and the proceeds of the sale thereof. The plaintiff asked equitable relief. *Held*, that the complaint failed to state a cause of action; that said conveyance to G. did not purport to convey any interest in the land, but at most only an interest in the trust fund after the land had been converted into money, and if G. took an interest under it, it was simply a possible equity in the trust fund, and so he had no legal title to which the lien of the judgment against him could attach, and the execution sale passed nothing to the purchaser; that the complaint was insufficient to reach any such equitable interest, as equitable assets only can be reached after the remedy by law is exhausted, the evidence of which is the return of an execution unsatisfied, and the complaint contained no such allegation; also, that plaintiff could not assert an interest in G. as tenant by the curtesy in his wife's land; that if, as to the land in question, she was seized at all, she took only a nominal fee which was subject to be and was defeated by the execution of the power of sale; also, that the right of a tenant by the curtesy is a legal right to be enforced against the claimant in possession, and so could not be enforced in this action as the purchaser under the sale by the executors was not a party. *Harvey v. Brishin.* 151

2. In an action upon a policy of fire insurance the complaint alleged the issuing of the policy, which

by its terms insured the property for a term beginning February 1, 1891; and that the property was destroyed by fire. The answer set up as a counterclaim that the policy was issued by mistake; that the agreement of the parties and the intention was to renew another policy, which expired February 17, 1891, the renewal not to take effect until the expiration of the original policy. Defendant asked that the policy be reformed so as to take effect only from February seventeenth. No reply was served. On the trial defendant claimed that to put in issue the facts stated as a counterclaim a reply was necessary, and, in the absence of one, they were admitted. *Held*, untenable; that the alleged counterclaim was not such, but only a defense, as it simply amounted to a denial of the making of the contract alleged, or of any liability thereon; that it could not be turned into an equitable counterclaim by asking a reformation of the contract; that any such relief was needless, as proof of the facts pleaded would disprove and defeat plaintiff's claim. *Walker v. Am. Cent. Ins. Co.* 167

3. To constitute a counterclaim, the facts stated must amount to an independent cause of action; where they serve merely to defeat plaintiff's cause of action they amount to a defense, not a counterclaim. *Id.*

4. Plaintiff's complaint alleged in substance that she was the wife of defendant, who, with intent to defraud her of her dower rights in his real estate, has purchased various pieces of land, the title to which he caused to be taken in the name of L. under a written agreement with the latter that defendant "should receive all the benefit of, and have control of said property;" that defendant did exercise full possession and control of the same, and when sold, L., pursuant to the agreement, executed conveyances to *bona fide* purchasers having no notice of plaintiff's interest, defendant receiving the purchase money; that all of the land so purchased except one piece had been thus

sold and conveyed. Plaintiff asked for a judgment adjudging the proceeds of such sales to be "still real estate and that this plaintiff has an inchoate right of dower in the same," and that the piece unconveyed be adjudged subject to her right of dower. *Held*, that the complaint did not set forth a cause of action; and so, that the overruling of a demurrer thereto was error. *Phelps v. Phelps.* 197

5. The complaint in an action for divorce brought by the wife alleged that the parties were married in this state and that plaintiff resided here. The summons was served in this state and defendant appeared and answered. The answer, after denying the commission of the offenses charged in the complaint, as a separate defense alleged that both parties were, "at all the times mentioned in the complaint," residents of the state of Pennsylvania, and that the courts of this state had no jurisdiction. To this plaintiff demurred as upon its face insufficient. Upon the pleadings and other proof which warranted a finding that the parties, before the commencement of the action, had separated, and that plaintiff was then a resident of this state as defined by the Code of Civil Procedure (§ 1768), an order was granted directing the payment by plaintiff of sums specified for counsel fee and alimony. It was claimed by the defendant that the fact of residence in another state was to be deemed settled by the demurrer. *Held*, that no such effect could be given to the pleadings upon a motion like this, in such an action, and that the court had power to make the order. *Gray v. Gray.* 354

6. While the formal demand for relief with which a complaint concludes is not conclusive as to the character of the action, *i. e.*, whether legal or equitable, yet where the complaint sets forth facts that may support equally an action at law or equity, the character of the action is determined by the relief demanded. *O'Brien v. Fitzgerald.* 877

7. The complaint in an action brought by receivers of corporations alleged that each of the defendants had been a director of the corporation during a period stated. This showed that they had not all been directors for the same length of time or during the same period. The complaint then set forth various acts of negligence and wrong doing on the part of defendants, as directors, resulting in large losses to the corporation. A money judgment was asked against the defendants jointly for the full amount of loss claimed. There was no averment that an accounting was necessary to ascertain the damages, nor was it asserted that defendants were severally liable for separate and personal misconduct. On demurrer based upon the ground that different causes of action affecting different defendants had been improperly joined, *held*, that the action was to be regarded as one at law; and so, that the demurrer was well taken. *Id.*

8. Where in an action of ejectment plaintiff claimed title under a devise in a will by which a legacy was given to one of the defendants and made chargeable upon the real estate in question, *held*, that the legacy did not constitute a counterclaim; also, that plaintiff was not required to demur to the answer setting it up as a counterclaim in order to raise the question, nor did he, by replying, waive his right to take the objection. *Dinan v. Coneys.* 544

9. Plaintiff's complaint alleged in substance that he owned stock of a corporation; that another stockholder offered to purchase his stock, making two offers, one \$30 per share, the other \$50 cash per share, with the right to another \$50 in January, 1894, in case the company should in the meanwhile have paid dividends of ten per cent for 1893. Plaintiff advised defendants, who were directors of the corporation, of these offers, and asked them as to the condition of the company that he might determine which one to accept; that they, knowing the facts, for the purpose of deceiving plaintiff and

making him believe that the business of the company was flourishing, made statements set forth in regard to its condition, the amount of stock paid in, etc., which they knew to be false, and advised him not to sell his stock at less than par; that relying on these statements he accepted the offer last mentioned; that the company was at the time insolvent and declared no dividends for 1893, and so plaintiff received but the \$50. Upon demurrer to the complaint, *held*, that it set forth facts sufficient to establish a legal fraud and damages resulting therefrom, to recover which an action was maintainable. *Rothmiller v. Stein.* 581

POLICE.

1. Under the provisions of the New York Consolidation Act (§ 273, chap. 410, Laws of 1882), declaring that "absence without leave of any member of the police force for five consecutive days shall be deemed and held to be a resignation, and the member so absent shall at the expiration of said period cease to be a member of the police force," the absence that will deprive a member of his place must be voluntary and intentional. *People ex rel. v. Martin.* 407

2. Where, therefore, a member of the force was dismissed for absence without leave for over five days, and it appeared that the absence was not his conscious act, but the result of temporary mental aberration, *held*, that the dismissal was error. *Id.*

POSSESSION.

See ADVERSE POSSESSION.

PRACTICE.

1. Where on appeal from a judgment entered on the report of a referee the appellant desires a review of the facts, he must insert in the record a statement that it contains all the evidence or all that is material to the question sought to be reviewed. *Dibble v. Dimick.* 549

2. No particular form of words, however, is required for this statement, and where there is a statement in the record that it contains all the testimony, and both parties proceed to argument without any objection as to the power of the General Term over the whole case, the court is warranted in assuming that all the evidence is in the case and should pass upon the facts. *Id.*

8. Where the record contained a statement that it contained all the testimony, and the order of the General Term was a general affirmation of the judgment without specifying the grounds or in any way limiting its legal effect, *held*, that the order imported that every question in the case both of law and fact had been disposed of; that to raise the point here that the General Term refused to review the facts for want of a proper and sufficient record, this should appear by a proper statement in the order, and that the fact that this appeared in the opinion of the General Term was not sufficient. *Id.*

4. In an action by an employee to recover an amount claimed to be due under a contract of employment, a settlement, an accord and satisfaction, or payment in full are affirmative defenses, and where not pleaded, evidence properly received as bearing upon the terms of the contract may not be used to establish such a defense. *Id.*

See APPEAL.
PLEADING.
TRIAL.

PRESUMPTIONS.

1. The record of a deed, while it may with other facts afford a presumption of delivery by the grantor to the grantee, is not conclusive evidence of such delivery. *Townsend v. Rackham.* 516

2. Where land is unclosed, uncultivated, unimproved and unoccupied, the facts that a person has for twenty years claimed title thereto, surveyed it, marked its boundaries by monuments, cut

trees thereon from time to time, and for a few years has paid taxes thereon, do not establish an adverse possession, nor do these facts, in the absence of a constructive or actual possession, authorize the presumption of a grant from the true owner. *Mission Immaculate Virgin v. Cronin.* 524

3. The acceptance of a draft by the drawee is no evidence of a loan by him to the drawer. The drawee is presumably a debtor for the amount of the draft and payment of it a discharge of the debt. *Doyle v. Unglish.* 556

— When consideration specified in deed intended as an advancement, presumed to be the estimate of the parties as to the value of the land. *See Palmer v. Culbertson.* 218

— Where will gives a devisee a life estate with power to sell, if necessary, for support and comfort, this gives power to mortgage, and where the devisee gives mortgage the presumption is that it was given for the purposes specified. *See Swarthout v. Ranier.* 497

PRINCIPAL AND AGENT.

1. Where the president of a private corporation has full personal charge of its business, he represents the corporation, and *prima facie* has power to do any act which its directors could authorize or ratify. *Oakes v. Cataraugus Water Co.* 480

2. A general power or authority given to an agent to do an act for his principal does not extend to a case where it appears that the agent himself is the person on the other side. Where a power is intended to be given to the agent to act as such in such a case, it must be expressed in language so plain that no other interpretation can rationally be given it. *Bank N. Y. Nat. Bkg. Assn. v. Am. D. & T. Co.* 559

3. So, also, the principle that where an agent has been clothed by his

principal with power to do an act in case of the existence of some fact peculiarly within the knowledge of the agent, and where the doing of the act is of itself a representation of the existence of the fact, the principal is estopped from denying its existence as against third parties dealing with the agent in good faith, and in reliance upon the representation, does not apply to a case where the agent, assuming to act for his principal, was himself the other party.

Id.

4. The declarations of an agent are only admissible against his principal when the agent is acting at least *prima facie* for his principal and within the scope of his actual or apparent authority.

Id.

PRISONS.

1. One committed to prison does not cease to be a prisoner because of the fact that he is not strictly confined, and is permitted by the officials in charge to go in and out of the prison. Nor is his position as prisoner affected by the fact that his commitment was illegal. *People v. Cady.*

100

2. The New York city prison, "The Tombs," is not a place of residence save for the keeper and his family, and a person cannot, under the guise of a commitment, or even without any commitment, go there as a prisoner and gain a residence.

Id.

PROMISE.

Where a promise is made by one person to another for the benefit of a third, in the absence of any liability of the promisee to such third person the latter cannot enforce the promise. *Townsend v. Rackham.*

516

See CONTRACTS.

PUBLIC INSTITUTIONS.

See COMMON SCHOOLS.

PUBLIC POLICY.

It seems, where the business of a private corporation or an individual is threatened with competition, a contract with the competitor that he shall abandon his enterprise and take employment at an agreed compensation, with such corporation or individual, is not against public policy. *Oakes v. Cattaraugus Water Co.*

430

QUESTIONS OF LAW AND FACT.

In an action to compel specific performance by the vendor of a contract for the sale of land, it appeared that plaintiff acquired title on sale under a judgment in a foreclosure suit, one of the defendants in which was an infant. Plaintiff here claimed that the summons was not served on said infant, and so his interest was not cut off by the foreclosure judgment. The judgment roll was put in evidence; it contained a petition, entitled in the action, signed and verified by the father of the infant, which stated that the summons and a copy of the complaint were served upon the infant "on the — day of September" in the year stated. The petition prayed for the appointment of a guardian *ad litem* for the infant. Such a guardian was appointed; he appeared in the action and put in the usual answer of such a guardian. Defendant put in evidence certain papers used by him on motion in the foreclosure suit that he be relieved from the purchase on the ground that the infant had not been served with the summons. Among them was an affidavit of the father to the effect that he was mistaken in his former affidavit, and that the infant was not served, but was at the time of the alleged service out of the state. The motion was denied. *Held*, that if the fact of the service could be traversed in this action the later affidavit was not conclusive, but the question was one of fact to be determined by the trial court, and it having found that the guardian *ad litem* was duly appointed and that de-

fendant's title was good, this included, if necessary to sustain the judgment, a finding that the summons was served. *Murphy v. Shea.* 78

— *When question of negligence one of law.*
See Frace v. N. Y., L. E. & W. R. R. Co. 182

RAILROAD CORPORATIONS.

1. Under the provision of the act of 1867 (Chap. 489, Laws of 1867) providing "for the construction of an experimental line of railway in the counties of New York and Westchester," which act authorized the W. S. Y. & P. R. Co. to construct an elevated railroad on the route therein specified, and provides (§ 9) that said company shall pay into the city of New York as a compensation for the use of its streets "five per cent of the net income of said railway" derived from passenger traffic, in such manner as the legislature may thereafter direct, the city was given no power to collect the specified percentage under then existing general laws, and until future legislation fixing the manner of payment the company could not be placed in default for refusal to make payment. *Mayor, etc., v. Manhattan R. Co.* 1
2. The act of 1868 (Chap. 855, Laws of 1868), entitled "An act supplementary to chapter 489, Laws of 1867, and to provide for the collection and application of revenue in the county of New York in certain cases," is invalid as it is violative of the provision of the Constitution (Art. 3, § 16) requiring that a private or local bill shall embrace but one subject which shall be expressed in its title. *Id.*
3. The different parts of said act are so interwoven and dependent one upon the other, that no portion thereof can be upheld after striking out the balance. *Id.*
4. The provisions, therefore, of said act which give direction as to the

manner of payment of the percentage specified in the act of 1867, fall with it, and, standing alone, may not be referred to as the directions called for by said last-mentioned act. *Id.*

5. Where, however, it appeared that the corporation named in said act of 1868 availed itself of the extended time given to it by the act in which to construct an experimental section, and after such section had been approved as prescribed, proceeded to construct the railroad along the route provided for in the act of 1867, with another form of motor, however, than that authorized by said act, as permitted by the act of 1868 (§ 1), and also availed itself of the permission given by said act to change its name (§ 5), and executed the bond required by it (§ 3); also that all the rights, powers, privileges and franchises of said company were sold on foreclosure of certain mortgages executed by it and the N. Y. E. R. R. Co. became vested therewith, and continued the construction and operation of the road; that the original company paid the five per cent in the manner prescribed by the act of 1868, and said N. Y. E. R. R. Co. after it acquired title also paid the same down to the passage of the act of 1875 (Chap. 595, Laws of 1875), which confirmed it in the possession and enjoyment of the property purchased, and gave to it certain other rights and privileges, and continued so to do thereafter until it leased the road to defendant, and that defendant continued to make payments of what it claimed to be five per cent of the rental, down to the commencement of this action for an accounting, *held*, that by virtue of these various acts on the part of defendant and its predecessors, and its acceptance of subsequent legislation based on the assumed validity of the act of 1868, there was a waiver of the defense that said act was unconstitutional. *Id.*
6. Under the provision of the Rapid Transit Act (§ 36, chap. 606, Laws of 1875), authorizing an elevated railway company, whose railway was then in operation, to con-

- struct connections with other railways, railroad depots or ferries, upon routes fixed by the commissioners, upon compliance with "the requirements and conditions imposed by said commissioners," the N. Y. E. R. Co., plaintiff's lessor, constructed an extension of its route on the east side of the city, known as "the Third Avenue line," connecting with various ferries and railroads, upon routes fixed by the commissioners, and it and defendant have since operated the same and have paid what was claimed by them to be the percentage upon the income derived from the passenger traffic thereon. Such commissioners exacted from the N. Y. E. R. Co., as a condition precedent to their laying out any connecting routes, an agreement and consent to certain conditions imposed by them. *Held* (ANDREWS, Ch. J., GRAY and BARTLETT, JJ., dissenting), that as to such line no liability to pay said percentage existed; that the words of said provision of the Rapid Transit Act, permitting the construction of the connecting routes, "with all the privileges and with like effect as though the same had been part of the original route," are simply a grant of power, upon conditions imposed by the commissioners, and do not carry with them the burdens imposed as to the original route; that defendant was not estopped from denying liability because of the payments previously made by it, and in the absence of some statutory liability, such as exists as to the original route under the act of 1867, it was not obliged to pay the percentage in future. *Id.*
7. Defendant set up as counterclaims sums paid by it as damages to abutting owners. *Held*, that there was no warranty in regard to the free use of the streets as against abutting owners, and so the counterclaims were not allowable. *Id.*
8. Also *held*, defendant was not entitled to recover back the sums paid by it as percentage; that the payments were voluntary and plaintiff was entitled to retain the same. *Id.*
9. The charter of a railroad corporation may not be annulled, or held forfeited in part, because of a violation by it of a private contract. *In re L. I. R. R. Co.* 67
10. So, also, the fact that such a corporation, propelling its cars by steam, has, by virtue of a private contract, surrendered the right to use steam on a small portion of its route, and that it has violated this contract, is no defense in proceedings instituted by it to condemn lands required and shown to be necessary for its corporate purposes. *Id.*
11. The company's corporate rights of eminent domain are unaffected by the breach of contract, and may still be exercised in a proper case. *Id.*
12. Where, therefore, in such proceedings it appeared that the petitioner, prior to 1859, was lawfully running its trains along an avenue in the city of Brooklyn; that, pursuant to the provisions of the act of that year (Chap. 184, Laws of 1859) providing for the relinquishment of its right to use steam power within the city, by which it surrendered such right in consideration of a sum paid to it, which was raised by assessment upon property benefited, and thereafter the common council of the city adopted a resolution authorizing the use of steam in running cars on said avenue, and the legislature passed an act (Chap. 187, Laws of 1876), authorizing the petitioner to run cars over its road on the avenue by steam power, whereupon the petitioner resumed the use of steam power on the avenue, *held*, that the question of the constitutionality of the act last mentioned was not presented; that if unconstitutional and the use of steam power on the avenue illegal, this was no defense to the proceedings. *Id.*
13. In an action to recover damages for the destruction of plaintiff's property by a fire alleged to have been kindled by sparks which escaped from an engine passing on defendant's road, it appeared that what is known as a "straight

- stack spark arrester" was used upon the engine, and the evidence was uncontradicted that this kind of spark arrester was in general use on many of the large railroads and on some was almost exclusively employed, and that it in fact arrested sparks as well as any kind that was known. The question was submitted by the trial court to the jury as to defendant's negligence in the adoption of a proper system or kind of spark arresters. *Held*, error. *Frace v. N. Y., L. E. & W. R. R. Co.* 182
14. *It seems*, the court may take judicial notice that the "diamond stack" and the "straight stack spark arresters" are in very general use upon the railroads of the country, and are both well-known systems for arresting sparks. *Id.*
15. The property destroyed was a barn and an hotel about forty feet distant therefrom. The barn first caught fire. The court charged that to justify a verdict including the value of the hotel, the jury must find "that the same was destroyed by reason of the fire being communicated thereto directly from the engine, or without the assistance of other agencies. *Held*, no error. *Id.*
16. *It seems*, the doctrine of the case of *Ryan v. N. Y. C. & H. R. R. Co.* (35 N. Y. 210) is not to be extended beyond the precise facts appearing therein. *Id.*
17. Under the provisions of the act providing for rapid transit railways in certain cities (Chap. 4, Laws of 1891, as amended by chap. 102, Laws of 1892), which makes the authorization of the Supreme Court a prerequisite to the right of a bridge company to construct and operate an elevated railway as an approach to its bridge, in case of failure to obtain the consent of property owners, the power conferred upon the court is discretionary and exclusive, and its order refusing the authorization upon the merits, where no abuse of its discretion is shown, is not reviewable here. *In re H. R. Bridge Co.* 249
18. Commissioners appointed under the General Railroad Act (Chap. 140, Laws of 1850, as amended) in proceedings to condemn lands for railroad purposes, are judges of the law and the fact so far as relates to the compensation to be awarded to landowners. When their order has been confirmed and the order of confirmation has been affirmed by the General Term of the Supreme Court, no further appeal can be taken. *In re S. B. R. R. Co.* 253
19. The General Term may set aside and vacate the report for errors of law or of fact, and direct a new appraisal. In which case the second report "is final and conclusive on all the parties interested" (§ 18), except in case there is some irregularity in the proceedings affecting the jurisdiction of the commissioners, or fraud, mistake or accident of such a character as would authorize a court of equity to set aside a judgment, a report of a referee or an award of arbitrators. *Id.*
20. *It seems*, where a case is brought within these exceptions, the Supreme Court may, upon motion, set aside the report of the commissioners, and if it refuses so to do, upon undisputed facts, an appeal from its determination may be taken to this court. *Id.*
21. An order confirming the report of commissioners in such a proceeding was reversed by the General Term, the report set aside and a new appraisal ordered. The second report was confirmed and the order of confirmation was affirmed by the General Term. An appeal to this court was dismissed. (141 N. Y. 532.) Thereupon the railroad company made a motion at Special Term to set aside and vacate the second report on the ground that the award made "was vitiated by error, misconduct, irregularity and mistake on the part of the commissioners." There was no claim of irregularity in the proceedings and no allegation of fraud, mistake or accident; the moving party simply alleged errors of law and fact in the determination made. The motion

was denied and the order, on appeal to the General Term, was affirmed. *Held*, that the General Term order was not appealable here; that the second report, even if demonstrably erroneous, was final and conclusive. *Id.*

22. The legislature has power to authorize a foreign railroad corporation, lawfully operating its road within this state, to acquire by condemnation additional lands required for railroad purposes. *N. Y., N. H. & H. R. R. Co. v. Welsh.* 411

23. Such a corporation, in the contemplation of the statutes of the state and to the extent of its existence and operation here, is *pro hac vice* a state corporation. *Id.*

24. Accordingly *held*, that the term "every railroad corporation" in the General Railroad Law (§ 4, chap. 565, Laws of 1892), and, *it seems*, the term "all existing corporations" in the General Railroad Act of 1850 (Chap. 140, Laws of 1850) include foreign railroad corporations, which under authority of law have extended and are operating their roads in this state, and that under the former act (§ 7) such a corporation had authority to acquire by condemnation additional real estate when needed for the proper operation of its road and to meet the public demands of travel and traffic. *Id.*

RECEIVER.

1. *It seems*, a receiver is not protected against replevin or other common-law action brought by a third person claiming paramount title to property in his possession as receiver. *Read v. Brayton.* 342

2. A failure to file a chattel mortgage, where there is no change of possession of the mortgaged property, renders it void as to then existing creditors of the mortgagor, and the mortgagee cannot thereafter acquire title to property by taking possession and selling the same under the mortgage and bidding it off on the sale, and this, although the mortgage was

given in good faith to secure an actual indebtedness. A receiver appointed in proceedings supplementary to execution may maintain an action against the mortgagee who has thus taken possession of and sold the mortgaged property, to recover the same or its value. *Stephens v. Perrine.* 476

3. Where, after the commencement of an action by a corporation to recover an indebtedness, it becomes insolvent and a receiver of its assets is appointed, this does not affect the right of action; this may still be asserted by it and the action continued by the receiver without any substitution, so long as there is no dissolution of the corporation by judgment of the court. *U. S. Vinegar Co. v. Spamer.* 676

RECORD.

1. Where on appeal from a judgment entered on the report of a referee the appellant desires a review of the facts, he must insert in the record a statement that it contains all the evidence or all that is material to the question sought to be reviewed. *Dibble v. Dimick.* 549

2. No particular form of words, however, is required for this statement, and where there is a statement in the record that it contains all the testimony, and both parties proceed to argument without any objection as to the power of the General Term over the whole case, the court is warranted in assuming that all the evidence is in the case and should pass upon the facts. *Id.*

3. Where the record contained a statement that it contained all the testimony, and the order of the General Term was a general affirmance of the judgment without specifying the grounds or in any way limiting its legal effect, *held*, that the order imported that every question in the case both of law and fact had been disposed of; that to raise the point here that the General Term refused to review the facts for want of a

proper and sufficient record, this should appear by a proper statement in the order, and that the fact that this appeared in the opinion of the General Term was not sufficient. *Id.*

RECORDING ACT.

S., who had a record title to an undivided one-fourth of certain real estate, was present when his co-owner executed a mortgage upon the whole parcel. The mortgagor asserted at the time that he was the sole owner, and that S. had no interest therein. S. assented to this and disclaimed all interest in the land. The mortgagee thereupon, without further inquiry as to title, took the mortgage. The interest of S. was thereafter sold on execution against him. Plaintiff purchased and received the sheriff's deed in good faith, relying upon the recorded title, and in ignorance of what took place when the mortgage was given. In an action for partition defendants claimed title to the whole of the land under a sale on foreclosure of the mortgage. It did not appear that there was any actual possession of the land when plaintiff purchased and took his conveyance which would operate as a constructive notice. *Held*, that plaintiff was protected by the Recording Act against an undisclosed equity in favor of the holder of the mortgage; that while S. was estopped from questioning the lien of the mortgage, the estoppel did not extend to and bind plaintiff, a *bona fide* purchaser; that he had a better title than S. which could not be defeated by an estoppel of which he had neither actual nor constructive notice. *Lyon v. Morgan*. 505

RECOVERY OF POSSESSION OF PERSONAL PROPERTY.

See REPLEVIN.

REDEMPTION.

1. On application to the state comptroller under the statute (§§ 68, 69,

70, chap. 427, Laws of 1855) for the redemption of a tract of land containing 5,455 acres, sold for unpaid taxes, it was claimed by the appellant that one D. had been an actual occupant of part of said land during the two years subsequent to the delivery of the comptroller's deed, and no notice to redeem had been served upon him. It appeared that D. occupied a log-house on an island in a lake included in the tract as a hunting camp at irregular intervals, and without any use of the mainland, except to roam over it in pursuit of game. *Held*, that this did not constitute actual occupancy within the meaning of the statute, and so that the application was properly denied. *People ex rel. v. Campbell*. 885

2. The application was made by one M.; the papers did not show that he had any interest in the premises. *Held*, that the provision of the act (§ 70) providing that "the occupant or any other person * * * may redeem the said land," did not permit a stranger to the title to intervene, but only included "any other person" having, or claiming in good faith to have, such substantial interest in the premises as would entitle him to redeem; and so, that the applicant was not entitled to redeem. *Id.*

REMEDIES.

1. A defendant in an equity action cannot avail himself of the defense that an adequate remedy at law exists, unless he pleads that defense in his answer, and where the facts alleged are sufficient to entitle plaintiff to relief in some form of action, and no objection has been made by defendant in his answer or on the trial, it is too late to raise the point after judgment or upon appeal. (Re-argument ordered, see note, p. 682.) *Lough v. Outerbridge*. 271
2. Where a plaintiff rightfully claims a preference on the trial calendar, and the defendant does not oppose the motion, but the same is denied by the courts, plaintiff's remedy is not by an ap-

peal but, *it seems*, by mandamus to compel the trial judge to do his duty. *Hayes v. Consolidated Gas Co. of N. Y.* 641

— *As to how right of husband as tenant by the curtesy is to be enforced.*

See Harvey v. Brisbin. 151

See CERTIORARI.
INJUNCTION.
REPLEVIN.
SPECIFIC PERFORMANCE.

REPLEVIN.

1. The owner of a chattel may in general replevy it from any person who has it in his possession and who has no right to retain it as against him. *Read v. Brayton.* 342

2. In an action brought by plaintiff against a bank to recover the amount of two certificates of deposit issued by it to him, the bank alleged that the certificates were in the hands of one R. as part of the assets of the estate of his deceased wife, and that they belonged to that estate. On the trial the certificates were produced by R. on a subpoena *duces tecum*, and were put in evidence by plaintiff, for whom the court directed judgment on the certificates, and ordered that they be deposited with the clerk of the court, to be retained until the further order of the court, he to indorse thereon that they were in judgment against the bank. The judgment was reversed on appeal to this court (136 N. Y. 154) on the ground that plaintiff was not in a position to surrender the certificates. At the expiration of his term of office the then clerk delivered the certificates to defendant here, his successor in office. In an action of replevin, brought to recover possession of the certificates, an order was granted perpetually restraining the prosecution thereof. The title of plaintiff to the certificates was not questioned, and it was admitted that they were in defendant's custody, and that he refused to deliver them up. *Held*, that the order was erroneous; that the court below had no authority to impound the

certificates and place them beyond the reach of a writ of replevin at the suit of the true owner; that the reversal of the judgment rendered any further control of the certificates by the court or its officers unnecessary, and that the direction of the trial court in the former action, that the certificates be retained by the clerk until the further order of the court, clothed the clerk with no immunity from liability in this action, as the direction was a nullity both as against R. and plaintiff. *Id.*

3. The principle that where the court has in the administration of justice gained possession through its receiver or other officer of the property in litigation, it is deemed to be in the custody of the law, and this cannot be disturbed without permission of the court, has no application to such a case; it applies only where there is a lawful possession under a lawful order of the court. *Id.*

4. *It seems*, a receiver or other officer of the court is not protected against replevin or other common-law action brought by a third person claiming paramount title to property in his possession as receiver. *Id.*

5. Even where property is in the custody of the law it is a matter of course for the court, on application made in good faith, to permit suit to be brought by a third person claiming rights therein, and if action has been brought without such permission the court will, if the conduct of plaintiff has not been willful, permit the action to proceed. *Id.*

6. Also *held*, that plaintiff was not bound to procure the appointment of representatives of the estate of Mrs. R. and apply to have them brought in as defendants; that whatever might be done to procure the substitution as defendant of the real claimant of a title hostile to that of plaintiff must be done by defendant. *Id.*

RESIDENCE.

See DOMICILE.

SALES.

1. Defendant sold to plaintiff his business, the fixtures and other property in his store. The contract of sale was in writing, under seal and contained a clause to the effect that it was understood and agreed that defendant had made no statements or representations for the purpose of inducing the sale, other than that he had been engaged in the business since 1867. In an action to set aside the sale and recover the consideration paid on the ground that plaintiff was induced to purchase by false and fraudulent representations as to the character of the property, the extent of the business and the income derived therefrom, it appeared that after the negotiations had been completed and the agreement drawn, the clause specified was inserted at the request of defendant. *Held*, that the provision was not a covenant but simply a statement in the nature of a certificate as to a fact; and that plaintiff was not precluded thereby from showing the fraud and obtaining relief therefrom. *Bridger v. Goldsmith*. 424
2. An agreement by the vendor, upon sale of a business and its good will, that he will not engage in a similar business in the same place for a period specified, is legal and valid and will be enforced by a court of equity. *Francisco v. Smith*. 488
3. Such an agreement is a valuable right in connection with the business it was designed to protect, and may be assigned by the purchaser upon a sale by him of the business, and the assignee may enforce it the same as the assignor could have done had he retained the business. *Id.*
4. Defendant, who, in February, 1888, was carrying on the business of baker and confectioner in Little Falls, in that year sold the business, its good will and the property in his place of business to F., the husband of plaintiff, agreeing that he would not, for

the period of five years from May first of that year, carry on that business in said village. F. carried on the business until November 10, 1889; he had given a chattel mortgage on a portion of the property, and on November 9, 1889, he gave a bill of sale to the mortgagees of all the property connected with the business; they, on the next day, by virtue of the mortgage and bill of sale, took possession of the property, closed the store and kept it closed until November nineteenth, when plaintiff, her husband acting as her agent, purchased the interests of said mortgagees, took possession, re-opened the store and thereafter carried on the business. Immediately prior to such purchase, plaintiff, with her husband, agreed that she would furnish the money to make the purchase and that he would take charge of and carry on the business in her name, the family to be supported out of it. On May 25, 1891, F., by an instrument in writing indorsed on the contract between him and defendant, in form transferred to plaintiff, without any actual consideration paid, all his interest in the contract and the covenants therein, the business formerly carried on by him and the good will. In December, 1890, defendant, without consent of plaintiff or her husband, commenced carrying on a similar bakery and confectionery business in said village. *Held*, that an action was maintainable by plaintiff to restrain defendant from carrying on such business and for damages. *Id.*

5. The maxim of *caveat emptor* as a general rule applies to sales of goods, and unless there is some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, the vendee is bound by the sale, notwithstanding the existence of extrinsic defects, materially affecting its value, known to the vendor and unknown to the vendee. *Rothmiller v. Stein*. 581
6. The exception to this general rule stated and the authorities upon subject collated. *Id.*

7. *It seems*, that while the law courts will not permit the recovery of damages against a vendor in a case coming under the general rule, because of mere concealment of a fact, yet, if the vendee refused to complete the contract because of the concealment of a material fact, equity will refuse to compel him to do so, as it only compels specific performance of a contract which is fair and open and in regard to which all the material facts known to each have been communicated to the other. *Id.*

8. In regard to a business corporation engaged in carrying on its business, the mere fact that it is temporarily insolvent is not of that kind of materiality as excepts a sale of its stock by one who had knowledge of this fact, but did not disclose it to the purchaser, from the general rule of *caveat emptor*. *Id.*

See TAX SALES.

SAVINGS BANKS.

See BANKS AND BANKING.

SEAL.

1. *It seems*, that the mere presence of a corporate seal upon an instrument in the form of a promissory note, executed by the corporation without any evidence that its officers intended to or did affix it, does not change the character of the instrument. *Weeks v. Esler*. 374

2. As to whether the presence upon such an instrument of the corporate seal would affect its negotiability, *quære*. *Id.*

3. A seal unnecessarily affixed to a contract for the sale of personal property cannot affect the rights of the parties, and every defense is open to either which would exist had the writing not been sealed. *Bridger v. Goldsmith*. 424

SERVICE AND PROOF OF.

1. To make competent proof of the service of a summons the affidavit of the person who made the serv-

ice is not necessary; the affidavit of a third person, who swears unequivocally and positively to the service, is sufficient. The presumption from such an affidavit is that the affiant swears from personal knowledge, not from hearsay. *Murphy v. Shea*. 78

2. In an action to compel specific performance by the vendor of a contract for the sale of land, it appeared that plaintiff acquired title on sale under a judgment in a foreclosure suit, one of the defendants in which was an infant. Plaintiff here claimed that the summons was not served on said infant, and so his interest was not cut off by the foreclosure judgment. The judgment roll was put in evidence; it contained a petition, entitled in the action, signed and verified by the father of the infant, which stated that the summons and a copy of the complaint were served upon the infant "on the — day of September" in the year stated. The petition prayed for the appointment of a guardian *ad litem* for the infant. Such a guardian was appointed; he appeared in the action and put in the usual answer of such a guardian. *Held*, that the judgment roll contained sufficient and competent evidence of service of the summons. *Id.*

3. Defendant put in evidence certain papers used by him on a motion in the foreclosure suit that he be relieved from the purchase on the ground that the infant had not been served with the summons. Among them was an affidavit of the father to the effect that he was mistaken in his former affidavit, and that the infant was not served, but was at the time of the alleged service out of the state. The motion was denied. *Held*, that if the fact of the service could be traversed in this action the later affidavit was not conclusive, but the question was one of fact to be determined by the trial court, and it having found that the guardian *ad litem* was duly appointed and that defendant's title was good, this included, if necessary to sustain the judgment, a finding that the summons was served. *Id.*

4. Under the provisions of the Code of Civil Procedure, providing for the service of a summons by publication upon a defendant out of the state (§§ 438, 439), which require that the order directing such a service shall be founded upon a verified complaint showing a sufficient cause of action against a defendant to be served, it is not sufficient that the complaint sets forth facts sufficient to constitute a cause of action; the cause of action must be one of which the court can take cognizance. *Paget v. Stevens.* 172

SHIPPING.

1. Where one of several joint owners of a vessel by contract with the others takes the vessel to sail it on shares, he to man her, to pay the crew, furnish supplies and have the absolute control and management thereof, he is in no sense the agent of his co-owners, but is the owner of the vessel *pro hac vice*. *Williams v. Hays.* 442
2. Where the vessel is lost through the negligence of such an owner, he is liable to his co-owners for the loss. *Id.*

SPECIFIC PERFORMANCE.

1. In an action to compel specific performance by the vendor of a contract for the sale of land, it appeared that plaintiff acquired title on sale under a judgment in a foreclosure suit, one of the defendants in which was an infant. Plaintiff here claimed that the summons was not served on said infant, and so his interest was not cut off by the foreclosure judgment. The judgment roll was put in evidence; it contained a petition, entitled in the action, signed and verified by the father of the infant, which stated that the summons and a copy of the complaint were served upon the infant "on the — day of September" in the year stated. The petition prayed for the appointment of a guardian *ad litem* for the infant. Such a guardian was appointed; he appeared in the action and put in the usual answer of such a

guardian. *Held*, that the judgment roll contained sufficient and competent evidence of service of the summons. *Murphy v. Shea.* 78

2. *It seems* the old rule in equity, that where in an action to compel specific performance of a contract to convey real estate, it appears that the defendant is unable to perform in consequence of a defect in his title, which arose after the making of the contract, without fault on his part, and the plaintiff knew of the defect when he commenced his action, the court will not retain the action for the purpose of awarding damages, has been so modified by the practice under the Code, which authorizes the joinder of legal and equitable causes of action, that in such case the action will be retained, and the issue as to breach and damages sent to a jury for trial. *Haffey v. Lynch.* 241
3. Neither the old rule nor the ground upon which it was based, had any application to a case where the defect has disappeared at the time of trial, and in such case, both under the old rule and the present practice, where it appears that there was a defect at the time of the commencement of the action, but the same has ceased to exist, and the vendor's title is valid and perfect at the time of trial, plaintiff is entitled to a judgment for specific performance. *Id.*
4. In an action to compel performance of a contract to convey land "by the usual deed containing full covenants with warranty" these facts appeared: At the date of the contract defendant had such a title as she contracted to give. Thereafter an action of ejectment was brought against her by a third person, who claimed the land in fee, in which action a *lis pendens* was filed. In consequence of this defendant refused to make a conveyance. Plaintiff knew of this claim and of the *lis pendens* when he commenced the action. Before the trial, however, the ejectment suit was tried, the complaint dismissed, and the judgment affirmed by the General Term. No appeal was taken to

this court and the time to appeal had expired. Plaintiff at the trial herein expressed his consent to accept a deed in terms as prescribed in the contract, and it did not appear that defendant had made any effort to remove the incumbrance of the *li pendens*. Held, that plaintiff was entitled to the relief sought; that it was defendant's duty to make all reasonable effort to remove any obstacle that stood in the way of performance. *Id.*

STATE.

The state can neither itself appropriate to its own special, continuous and exclusive use, nor can it authorize a corporation to so appropriate, any portion of a rural public highway, by setting up poles therein for the purpose of supporting telegraph or telephone wires. *Eels v. Am. Tel. & Tel. Co.* 183

STATUTES.

1. It is the duty of the court, when passing upon an act of the Legislature, to uphold and give effect to it if possible, when the legislative intent is plain. *People ex rel. v. Bd. County Canvassers.* 84

2. Where a statute expresses plainly the legislative intent, and provides fully upon the subject considered, it is not invalidated by the fact that it is put in the form of an amendment to a statute which had previously been repealed; it may be upheld as an independent statute. *Id.*

— § 9, chap. 489, *Laws of 1867.*

— Chap. 855, *Laws of 1868.*

— Chap. 595, *Laws of 1875.*

— § 36, chap. 606, *Laws of 1875.*

See Mayor, etc., v. Manhattan R. Co., 1.

— Chap. 410, *Laws of 1882.*

See People ex rel. Hoffman v. Board of Education, 62.

— Chap. 484, *Laws of 1859.*

— Chap. 187, *Laws of 1876.*

See In re L. I. R. Co., 67.

— § 16, chap. 179, *Laws of 1856.*

— Chap. 555, *Laws of 1864.*

— Chap. 414, *Laws of 1883.*

See People ex rel. Strough v. Bd. of Canvassers, 84.

— §§ 4, 5, chap. 713, *Laws of 1887.*

— Chap. 399, *Laws of 1892.*

See In re Fayerweather, 114.

— Chap. 713, *Laws of 1887.*

See In re Roosevelt, 121.

— Chap. 265, *Laws of 1848.*

— Chap. 471, *Laws of 1858.*

See Eels v. Am. Tel. & T. Co., 183.

— Chap. 345, *Laws of 1860.*

See N. Y. Real Estate & B. I. Co. v. Motley, 156.

— 1 R. S., 754, § 25.

See Palmer v. Culbertson, 213.

— Chap. 4, *Laws of 1891.*

— Chap. 102, *Laws of 1892.*

See In re East River Bridge Co., 249.

— Chap. 140, *Laws of 1850.*

See In re Southern Boulevard R. Co., 253.

— § 22, chap. 399, *Laws of 1892.*

See In re Hoffman, 327.

— §§ 68, 69, 70, chap. 427, *Laws of 1855.*

See People ex rel. Marsh v. Campbell, 335.

— § 5, chap. 691, *Laws of 1892.*

— § 30, chap. 687, *Laws of 1892.*

See Marsteller v. Mills, 398.

— § 273, chap. 410, *Laws of 1882.*

See People ex rel. Mitchell v. Martin, 407.

— Chap. 140, *Laws of 1850.*

— §§ 4, 7, chap. 565, *Laws of 1892.*

See N. Y., N. H. & H. R. R. Co. v. Welsh, 411.

— Chap. 680, *Laws of 1892.*

See People v. McKane, 455.

— § 18, chap. 40, *Laws of 1848.*

See Hunting v. Blun, 511.

— Art. 7, §§ 2, 80, chap. 566, *Laws of 1890.*

See Vil. of Pelham Manor v. M. V. Water Co., 532.

— Chap. 787, *Laws of 1878.*

— Chap. 213, *Laws of 1881.*

— Chap. 335, *Laws of 1886.*

See In re City of Brooklyn, 596.

SEE COLLATERAL INHERITANCE TAX ACT.

LIMITATIONS (STATUTE OF). TRANSFER TAX ACT.

STIPULATION.

1. The parties hereto stipulated that the action be discontinued upon terms specified, the order of discontinuance to be without prejudice to a motion for extra allow-

ance, and if allowance be granted and not paid, that defendants could move to vacate the order of discontinuance *ex parte*. Upon this stipulation an order of discontinuance was entered which recited that plaintiff had complied with all terms "except to the extra allowance to be hereafter disposed of." An order of Special Term granting an extra allowance was reversed by the General Term without considering the merits, on the ground, as appears by its order, that the court had no power after discontinuance to grant an extra allowance. *Held*, error; that the parties had power to enter into the stipulation and pursuant to it the motion for extra allowance was regular, and the General Term had power to review on the merits the order granting it. *H. B. M. & F. R. Co. v. Town Board Westchester.* 59

2. Where, after the commencement of an action by a corporation to recover an indebtedness, it becomes insolvent and a receiver of its assets is appointed, this does not affect the right of action; this may still be asserted by it and the action continued by the receiver without any substitution, so long as there is no dissolution of the corporation by judgment of the court. *U. S. Vinegar Co. v. Spamer.* 676

STOCKHOLDERS.

1. Plaintiff, who, as his complaint stated, sued as a stockholder of a mining corporation in his own behalf and that of others similarly situated, sought to set aside and annul various transactions relating to and conveyances of property alleged to belong to the corporation, on the ground that said conveyances were fraudulent, and intended to injure and defraud plaintiff and others similarly situated. Among the alleged fraudulent transactions was the foreclosure of a mortgage executed by the company. The complaint alleged that in the foreclosure suit the corporation and the trustee for the mortgage bondholders were made defendants, and appeared and answered, set-

ting forth the same matters as were set forth in the complaint herein, and the same issues were presented in that action as in this; those issues were litigated in that action and determined against the defendants. No allegations of collusion or other grounds which would give a court of equity jurisdiction to set aside the judgment were made against it. *Held*, that plaintiff was estopped by said judgment; that plaintiff's right of action was a derivative one, he suing not primarily in his own right, but in that of the corporation, and so any defense which defendants would have if the corporation was plaintiff might be interposed against the stockholder. *Alexander v. Donohoe.* 208

2. The complaint alleged that prior to the formation of said corporation the property was held by trustees, who had issued trust certificates, and who subsequently conveyed to another corporation; that plaintiff held certain of said certificates, which, more than twelve years before the commencement of this action, he exchanged for stock of a corporation, and subsequently exchanged said stock for the stock of the corporation as a stockholder of which he sued, to which the property had been transferred. *Held*, that plaintiff could not, at least until he had repudiated the exchange as void, claim as *cestui que trust*, and so escape the bar of the foreclosure judgment; that even if not bound to rescind and to offer to surrender his stock, and demand to be reinstated in his position as a certificate holder before the commencement of his action, or in his complaint, he was at least bound to do so on the trial, and having failed so to do could only claim as stockholder, and was bound by the foreclosure judgment. *Id.*
3. Where a stockholder brings an action against his corporation and fails, the payment by him of the judgment for costs puts him in the same relations to the corporation that he has occupied before, and the directors may not resist an application for the transfer of his

stock by setting up a claim that by reason of the suit the corporation was obliged to pay counsel fees and expenses in the litigation which were not covered by the taxable costs. *Cassagne v. Marvin*. 292

4. In an action under the General Manufacturing Act (§ 18, chap. 40, Laws of 1848) to enforce the liability imposed by the act upon a stockholder of an insolvent corporation, to excuse the non-performance of the condition precedent to such liability, *i. e.*, the recovery of a judgment against the corporation and the return of an execution issued thereon unsatisfied, plaintiff produced a record of a judgment in an action in the Supreme Court, brought by a judgment creditor of the corporation to sequester its property and for the appointment of a receiver. The complaint in that action alleged the recovery of a judgment against the corporation in the Auburn City Court, and the issue and return of an execution thereon unsatisfied. The judgment granted the relief sought, and forbade creditors from suing the company. The corporation was not located in said city. Defendant claimed that the judgment was void for want of jurisdiction, and so the injunction was a nullity and might have been disregarded. *Held*, that, conceding the invalidity of the judgment, plaintiff was not bound to disregard it, and that the non-performance of the condition was excused; but, *held*, that the complaint in the former action presented a case over which the court had jurisdiction; that the question as to the validity of the City Court judgment was one of law for it to decide, and, although it erred in adjudging it to be valid, this was a judicial error, and the judgment of sequestration could not be attacked collaterally, but the mistake, if made, was available only on appeal or some direct review of the decision. *Hunting v. Blun*. 511

STREETS.

See HIGHWAYS.

SUMMONS.

1. To make competent proof of the service of a summons the affidavit of the person who made the service is not necessary; the affidavit of a third person, who swears unequivocally and positively to the service, is sufficient. The presumption from such an affidavit is that the affiant swears from personal knowledge, not from hearsay. *Murphy v. Shea*. 78
2. Defendant put in evidence certain papers used by him on a motion in the foreclosure suit that he be relieved from the purchase on the ground that the infant had not been served with the summons. Among them was an affidavit of the father to the effect that he was mistaken in his former affidavit, and that the infant was not served, but was at the time of the alleged service out of the state. The motion was denied. *Held*, that if the fact of the service could be traversed in this action the later affidavit was not conclusive, but the question was one of fact to be determined by the trial court, and it having found that the guardian *ad litem* was duly appointed and that defendant's title was good, this included, if necessary to sustain the judgment, a finding that the summons was served. *Id*.
3. Under the provisions of the Code of Civil Procedure, providing for the service of a summons by publication upon a defendant out of the state (§§ 488, 489), which require that the order directing such a service shall be founded upon a verified complaint showing a sufficient cause of action against a defendant to be served, it is not sufficient that the complaint sets forth facts sufficient to constitute a cause of action; the cause of action must be one of which the court can take cognizance. *Paget v. Stevens*. 172
4. An action was brought in the Court of Common Pleas in and for the city and county of New York to remove two trustees of a trust created under a will, one of whom is and was at the commencement of the action and during the time

mentioned in the complaint a resident of Massachusetts, and none of the acts complained of were done in this state. One of the plaintiffs, also a trustee, resides in the city of New York; the other plaintiff, a *cestui que trust*, resides in England. An order was made for the service of the summons on said non-resident trustee by publication. On motion to vacate the order, *held*, that said court had no jurisdiction; and so, that a denial of the motion was error. *Id.*

SUPERIOR CITY COURTS.

1. An action to remove testamentary trustees, holding title to real estate under the trust, is a purely personal action, having no connection with the title, within the meaning of the provision of said Code (Subd. 1, § 268), giving to superior city courts jurisdiction in an action to procure a judgment affecting an estate or interest in real property or a chattel real. *Paget v. Stevens.* 172
2. The provision of said Code (Subd. 1, § 268), giving to said courts jurisdiction of an action "brought by a resident of the city wherein the court is located against a natural person who is not a resident of the state," includes cases where a sole plaintiff or all of the plaintiffs are residents of the city; it does not give jurisdiction where one of two or more plaintiffs, who is not merely a formal, but an interested party is a non-resident. *Id.*
3. An action was brought in the Court of Common Pleas in and for the city and county of New York to remove two trustees of a trust created under a will, one of whom is and was at the commencement of the action and during the time mentioned in the complaint a resident of Massachusetts, and none of the acts complained of were done in this state. One of the plaintiffs, also a trustee, resides in the city of New York; the other plaintiff, a *cestui que trust*, resides in England. An order was made for the service of

the summons on said non-resident trustee by publication. On motion to vacate the order, *held*, that said court had no jurisdiction, and so, that a denial of the motion was error. *Id.*

SUPPLEMENTARY PROCEEDINGS.

1. Under the provisions of the Code of Civil Procedure (§ 2435) authorizing a judgment creditor to institute proceedings supplementary to execution "at any time within ten years after the return wholly or partly unsatisfied of an execution against property," an execution which is effective to exhaust the remedy at law is intended; and so, it is not enough that forms are observed by the return of an execution which is not effective to reach all of the debtor's property, and the right does not arise unless at the time of issuing the execution the creditor had a judgment which was a lien on the debtor's real estate and chattels real, so that the execution could reach them as well as his personal property. *I. & F. Nat. Bank v. Quackenbush.* 567
2. Where, therefore, a judgment was recovered in January, 1879, and execution was issued thereon in March, 1894, and upon return thereof unsatisfied an order was issued requiring defendant to appear and answer in supplementary proceedings, *held*, that a motion to vacate the order was improperly denied; that as under said Code (§ 1251) the lien of the judgment upon defendant's real estate and chattels real ceased after ten years, the execution was not effective to reach all the debtor's property so as to exhaust the legal remedy, and, as no steps had been taken to re-establish the lien, the proceedings were improperly instituted. *Id.*
3. A prior execution had been issued upon the judgment immediately after its rendition, which was returned unsatisfied. *Held*, that the right to maintain supplementary proceedings then accrued and became barred after the lapse of ten

years, in the absence of some new proceedings to revive it, to which the debtor was a party. *Id.*

TAXATION.

See ASSESSMENT AND TAXATION.
COLLATERAL INHERITANCE TAX
ACT.
TRANSFER TAX ACT.

TAX SALES.

1. On application to the state comptroller under the statute (§§ 68, 69, 70, chap. 427, Laws of 1855) for the redemption of a tract of land containing 5,455 acres, sold for unpaid taxes, it was claimed by the appellant that one D. had been an actual occupant of part of said land during the two years subsequent to the delivery of the comptroller's deed, and no notice to redeem had been served upon him. It appeared that D. occupied a loghouse on an island in a lake included in the tract as a hunting camp at irregular intervals, and without any use of the mainland, except to roam over it in pursuit of game. *Held*, that this did not constitute actual occupancy within the meaning of the statute, and so that the application was properly denied. *People ex rel. v. Campbell*. 385

2. The application was made by one M.; the papers did not show that he had any interest in the premises. *Held*, that the provision of the act (§ 70) providing that "the occupant or any other person * * * may redeem the said land," did not permit a stranger to the title to intervene, but only included "any other person" having, or claiming in good faith to have, such substantial interest in the premises as would entitle him to redeem; and so, that the applicant was not entitled to redeem. *Id.*

TELEGRAPH COMPANIES.

1. The state can neither itself appropriate to its own special, continuous and exclusive use, nor can it authorize a corporation to so ap-

propriate, any portion of a rural public highway, by setting up poles therein for the purpose of supporting telegraph or telephone wires. *Eels v. Am. Tel. & Tel. Co.* 133

2. The question as to the legality of such a use is not affected by the fact that the legislature by statutory enactments has manifested its belief in the existence of such a right, or by the fact that adjoining owners have generally acquiesced in such a use. *Id.*
3. Where, therefore, a telegraph and telephone company, organized under the laws of this state (Chap. 265, Laws of 1848, as amended by chap. 471, Laws of 1858), had, without the consent of an adjoining owner, who owned the fee of a highway, and without having acquired the right by condemnation proceedings, erected its poles in the highway and strung wires thereon for the purposes of its business, *held*, that such a use of the highway was unlawful; and that an action of ejectment was maintainable against it. *Id.*

TELEPHONE COMPANIES.

See TELEGRAPH COMPANIES.

TENANT BY THE CURTESY.

— *As to how right of husband as tenant by the curtesy is to be enforced.*
See Harcey v. Brisbin. 151

TITLE.

1. A failure to file a chattel mortgage, where there is no change of possession of the mortgaged property, renders it void as to then existing creditors of the mortgagor, and the mortgagee cannot thereafter acquire title to property by taking possession and selling the same under the mortgage and bidding it off on the sale, and this, although the mortgage was given in good faith to secure an actual indebtedness. *Stephens v. Perrine.* 476

2. *It seems*, a *bona fide* transfer of the property by the mortgagor to the mortgagee, in payment of the mortgage debt, before a creditor has obtained judgment and execution or any lien upon the property, will give a good title to the mortgagee and so defeat the creditor's right to assail the mortgage. *Id.*

3. In an action of ejectment plaintiff proved title under a sale on foreclosure of mortgages covering a tract of land including the land in question executed in 1852 by the then owner. These facts appeared from defendant's evidence: In 1861 the owner gave D. a contract for the land in question. In 1867 D. executed a conveyance thereof to R., who gave a contract therefor to H. The latter executed a conveyance thereof to defendants. At the time of the commencement of the foreclosure suit R. was in possession. D. and R. were parties to the foreclosure suit. Neither the plaintiff in the foreclosure suit nor the purchaser at the foreclosure sale had notice of any rights or interest of H. in the land. It appeared that D. before the conveyance to R. executed a conveyance of the land to another for a good consideration; also, that neither of the contracts above specified were ever performed. *Held*, that defendants failed to show any title or equitable interests; and so, were not entitled to any relief. *Dyke v. Spargur*. 651

TORTS.

1. An insane person is liable for his torts the same as a sane person, except for those torts in which malice, and, therefore, intention, is a necessary ingredient. *Williams v. Hays*. 442

2. In respect to this liability there is no distinction between torts of non-feasance and of misfeasance, and so an insane person is liable for injuries caused by his tortious negligence, and so far as this liability is concerned, is held to the same degree of care and diligence as a person of sound mind. *Id.*

3. The authorities on the subject of the liability of insane persons for torts collated. *Id.*

TRANSFER TAX ACT.

1. By the will of H. she gave a fund of \$50,000 to trustees in trust to hold the same for the lives of the mother of the testatrix and of her daughter, the income to be paid to the mother for life and if the daughter survived, to her for life, the principal at the expiration of the trust to be paid to the issue of the daughter, if any living at her death, if none then to two nieces of the testatrix. The testatrix died leaving her mother, daughter and a child of the latter surviving. In proceedings before the surrogate to fix the amount of tax, under the Transfer Tax Act of 1892 (Chap. 399, Laws of 1892), it was decided that the value of the mother's life estate was less than \$10,000. *Held*, that under the provision of said act (§ 22) declaring that the words "estate" and "property," as used therein, shall "mean the property or interest therein of the testator," passing or transferred, not that "passing or transferred to individual legatees," etc., and that the word "transfer" shall "include the passing of property or interest therein in possession or enjoyment," the life estate of the mother did not come within the limitation in said act (§ 2) declaring that "such transfer of property shall not be taxable under this act unless it is personal property of the value of ten thousand dollars or more;" that the limitation applied to the aggregate value of all the property so transferred, not to the separate value of each several transfer; and so, that the mother's interest was taxable; but that the estates of the daughter and grandchild were not presently taxable, and could only be taxed when their rights became fixed and actual. *In re Hoffman*. 827

2. *It seems*, that said definitions do not affect the general nature of the tax imposed by the act as heretofore determined by this

court; *i. e.*, that the tax is imposed upon the right of succession to property or estates which vest in the successors severally, and not upon the property or estate of the decedent; but they apply simply to provisions of the act, like the one fixing the limitation, where the word "property" is used by itself and to some extent ambiguously, and, therefore, needs the help of a definition. *Id.*

TRANSPORTATION CORPORATIONS ACT.

See WATER WORKS COMPANIES.

TRIAL.

1. The parties entered into a contract by which plaintiff agreed to supervise and build a house for defendant, to contract for the work and charge everything at the exact cost, for which he was to furnish vouchers. In an action to recover a balance alleged to be due for moneys paid out by plaintiff for work and materials, it appeared that plaintiff rendered a statement to defendant of moneys expended, accompanied by the vouchers therefor, and upon the trial he proved the expenditure of all the moneys claimed. *Held*, that the evidence was sufficient to sustain a recovery; that plaintiff acted as agent for defendant, and as such was bound simply to act in good faith and in the usual way in making expenditures; that it was not necessary for him to show that all the materials charged were actually used in the building, but the vouchers were sufficient *prima facie* evidence, and as to the labor, it was sufficient for him to show, as was shown, that he employed men upon the building under foremen who kept their time, and that he made payments according to the time thus kept. *Blazo v. Gill.* 232
2. While the uncorroborated evidence of prostitutes alone is insufficient to sustain a charge of adultery in an action for divorce, yet slight corroboration is sufficient where the defendant fails to take

the stand in his own behalf. *McCarthy v. McCarthy.* 235

3. In an action by a wife for divorce on the ground of adultery, where the case is litigated, it is not incumbent upon the plaintiff to make affirmative proof of the allegations inserted in her complaint in compliance with the rules of the Supreme Court (Rule 73), *i. e.*, that the adultery charged was "without the consent, privity or procurement of the plaintiff," and that the latter has not voluntarily cohabited with defendant since discovery of the fact; these are matters of affirmative defense. It is only to provide for a case of defendant suffering a default that these possible defenses are required to be negatived by plaintiff by verified complaint or affidavit. *Id.*
4. Where, in such an action, the charges of adultery in the complaint are put in issue by the answer, and counter allegations of adultery on the part of plaintiff are made thereon, and the issues are tried together, the reception of testimony of the plaintiff, incompetent under the Code of Civil Procedure (§ 831) as to the issues presented upon the charges in the complaint, but which is competent upon the issues presented by the counter charges in the answer, is not error. *Id.*
5. *It seems* the old rule in equity, that where in an action to compel specific performance of a contract to convey real estate, it appears that the defendant is unable to perform in consequence of a defect in his title, which arose after the making of the contract, without fault on his part, and the plaintiff knew of the defect when he commenced his action, the court will not retain the action for the purpose of awarding damages, has been so modified by the practice under the Code, which authorizes the joinder of legal and equitable causes of action, that in such case the action will be retained, and the issue as to breach and damages sent to a jury for trial. *Haffey v. Lynch.* 241

6. Neither the old rule nor the ground upon which it was based, had any application to a case where the defect has disappeared at the time of trial, and in such case, both under the old rule and the present practice, where it appears that there was a defect at the time of the commencement of the action, but the same has ceased to exist, and the vendor's title is valid and perfect at the time of trial, plaintiff is entitled to a judgment for specific performance. *Id.*
7. Equity courts, as a general rule, look at the conditions existing at the time of the close of a trial therein and adapt their relief to those conditions, and the plaintiff will not be turned out of court because of any defense interposed, if at the time of trial the facts are such, that if he then commenced the action, he would be entitled to the equitable relief sought. *Id.*
8. A policy of insurance contained a clause declaring that "this policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or wind storm)." In an action on the policy plaintiff's evidence was to the effect that the buildings insured were struck by lightning, and that immediately thereafter a high wind came up; it also appeared that part of the damage done was due to the wind. The court charged the jury in substance, among other things, that if they found that the buildings were struck by lightning, and this was the primary cause of the loss, plaintiff was entitled to recover the whole loss, although the wind increased the damage. The court also refused to charge that "the jury must strictly confine their verdict to the actual damage done by the lightning, and cannot give a verdict for the damage done by the wind." *Held*, error; that under the policy the recovery should have been limited to the direct loss or damage done by the lightning. *Beakes v. Phoenix Ins. Co.* 402
9. Where evidence tending to prove a material fact at issue in an action, but which requires proof of other facts to complete the chain of proof, is received under objection, and such other facts are not proved, the presence of the evidence in the record is no ground for reversal in the absence of a motion to strike it out. *U. S. Vinegar Co. v. Schlegel.* 537
10. In an action brought by a corporation of another state to recover upon a subscription to its capital stock, one defense was that plaintiff was incorporated for an illegal purpose. There was no proof of any corporate act pointing to any illegal purpose or object. The proof on that point was a printed prospectus issued by certain promoters of the company, a blank form of contract to be used, and numerous acts and declarations by them before the corporation was created. It did not appear that these were ever adopted or acted upon by the corporation. *Held*, that the defense was not sustained; that such documents, acts and declarations could not be used to defeat contracts made with or obligations incurred by an individual to the corporation; and so, it was immaterial whether they furnished evidence of any illegal purpose by any one. *Id.*
11. In an action by an employee to recover an amount claimed to be due under a contract of employment, a settlement, an accord and satisfaction, or payment in full, are affirmative defenses, and where not pleaded, evidence properly received as bearing upon the terms of the contract may not be used to establish such a defense. *Dibble v. Dimick.* 549
12. In an action to recover an alleged loan, the complaint set up part payment by delivery of certain goods and asked judgment for the balance. The answer, after a general denial, alleged a sale and delivery of goods by defendants to plaintiffs, at an agreed price, payments thereon to an amount specified, leaving a balance due, for which judgment was asked. Plaintiff, on the trial, simply

produced drafts drawn by defendants upon them and his acceptance and payment thereof. No motion for a non-suit was made and the trial proceeded, the substantial controversy being as to the agreed price for the goods sold, in regard to which the evidence was conflicting, and the only claim of plaintiffs, if any, was for an overpayment. The court was requested by plaintiffs, but refused, to charge that, so far as the counterclaim was concerned, the burden of proof rested upon defendants. *Held*, no error; that while the charge would have been proper had plaintiffs proved the alleged loan, as they failed in this and were obliged to prove an overpayment on the contract of sale, and to show this were required to prove its terms, upon this issue they, not the defendants, had the affirmative. *Doyle v. Unglish*. 556

— *If a mistake has been made in drafting a contract, or it is ambiguous or indefinite, or does not express the intent of all the parties, it is the duty of the trial court, in an action upon the contract tried by the court, to find the facts. If the ambiguity can be solved, or an omission to express what the parties had in mind can be supplied by oral proof, then the particular fact established should be found, and, in the absence of such a finding, this court may not resort to the evidence to spell out what the parties intended to embody in the instrument.*

See Camp v. Treanor (Mem.). 649

See CRIMINAL TRIAL.

TRUSTS AND TRUSTEES.

1. Certain holders of bonds secured by mortgage upon a hotel, which was being foreclosed, entered into an agreement with each other by which defendants, who were parties to the agreement, were appointed trustees, and were authorized to purchase the property on the foreclosure sale and hold it for the benefit of those joining in the agreement. Defendants purchased the property, took a conveyance and entered into possession thereof; there-
- after the parties to the agreement executed another instrument ratifying and confirming the trust and waiving all matters and things that could impeach or invalidate it. Defendants, as such trustees, under an arrangement with the contracting parties, issued to each a certificate for his share, transferable in form. On the back of each certificate was a printed form of transfer the same as that in common use with respect to certificates of corporate stock to which a note was appended to the effect that a purchaser might receive a new certificate on return of the original to the trustees properly assigned. R., the holder of one of these certificates, duly assigned the same to plaintiff for a valuable and full consideration. Prior to the assignment, plaintiff agreed to purchase on condition that a new certificate in her name could be procured. She corresponded with defendants and was induced thereby to believe that there would be no difficulty in this respect, and thereupon she completed the purchase. On presentation of the assigned certificate defendants refused to issue a new one to plaintiff. At the time of the assignment a suit was pending brought by R. against defendants to recover a dividend alleged to be due for her share of the rents and profits. After the assignment said action was brought to trial, R. was defeated and a judgment rendered against her for costs, which she paid. Defendants incurred expenses in the action over and above the costs taxed, and in this action, brought to compel them to issue to plaintiff a new certificate, defendants claimed that plaintiff's certificate or interest was chargeable with such expense. *Held*, untenable. *Cassagne v. Marvin*. 292
2. Also, *held*, that without regard to the question as to whether the trust attempted to be created was a technical statutory one, defendants occupied a fiduciary relation toward the holders of the certificates, and having voluntarily assumed the obligation to issue new certificates to assignees of those originally issued, they

were equitably bound so to do; that the relations, duties and obligations between the trustees and beneficiaries were analogous to those between stockholders of a corporation and its directors and officers. *Id.*

3. A person dealing with a trustee must take notice of the scope of his authority, and, while an act within his authority, done by him with intent to defraud the estate, and which accomplished that purpose, will bind the estate or the beneficiaries, as to third persons acting in good faith and without notice, where the act is beyond the scope of the trustee's authority, such third person is not protected. *Kirsch v. Tozier*. 390

4. Defendant L., who, pursuant to an arrangement, had bid off at a foreclosure sale certain lands in which three infants had an interest as children and heirs at law of the deceased mortgagee, upon receipt of a deed from the widow of the mortgagor of her interest in the lands, executed a mortgage thereon to defendant O. in trust for the three children for \$1,000, payable in three installments, with interest, which mortgage was duly recorded. Subsequently L. conveyed the lands to O., who thereafter, and on February 19, 1886, executed, without consideration, and acknowledged a discharge of the mortgage, which he caused to be recorded on March 9, 1886. The first installment of the mortgage was not then due. In an action by the children to reinstate the mortgage and to foreclose the same it appeared that before the execution of the discharge, O. applied to defendant, the B. Sav. Bank, for a loan on the property, which application was granted February 1, 1886. On examination of the title an abstract by the county clerk was submitted to the bank; this contained a memorandum of the mortgage, which was described as given in trust for said minor children. Across this was written: "Discharged March 6, 1886." The bank made the loan, having no notice or knowledge of the mortgage except as given by the

abstract and the record of the mortgage. *Held*, that the acceptance by O. of the mortgage containing the declaration of trust was an acknowledgment of the trust and bound him to perform it; that the satisfaction of the mortgage was a breach of trust; that the bank was chargeable with knowledge of the trust; also, that the relation of the trustee to the property had changed, so that when he executed the satisfaction he was himself the owner of the land, and in satisfying the mortgage was dealing with the trust, and that he satisfied it before it became due; that there was no indication in the mortgage of authority in the trustee to accept payment before it became due, or to vary the trust security; that the bank was bound to inquire by what authority the trustee acted, and having failed to do so, and in the absence of proof of any affirmative power conferred upon him, it was not protected, and that plaintiffs were entitled to the relief sought. *Id.*

5. A cause of action against a domestic business corporation for injuries caused by its negligence does not abate upon its dissolution, but survives, and an action thereon is maintainable against the trustees holding the corporate property for the purpose of distribution. (§ 5, chap. 691, Laws of 1892; § 80, chap. 687, Laws of 1892.) *Marsteller v. Mills*. 398
6. Within the meaning of the provision of the "General Corporation Law" (Chap. 687, Laws of 1892), which provides that, upon the dissolution of a corporation, its directors or managers shall, unless other persons are appointed, be the trustees of the "creditors and stockholders," the word "creditors" includes all those to whom the corporation was under any enforceable obligation at the time of its dissolution, as well as those to whom it was indebted. *Id.*
7. F., in 1857, conveyed certain premises to two of her grandchildren, taking back a mortgage

which was conditioned for the payment by the mortgagors to her of specified sums annually and that they should provide for her board, clothing and all things proper for her comfort and support during her life, and five years after her death that they should pay \$1,000 to M., a sister, and \$500 to E., a granddaughter of the mortgagee. This mortgage was soon after satisfied of record, and said mortgagors executed and delivered to F. another mortgage on the same premises, with substantially the same conditions save a slight alteration as to her clothing and support. Thereafter, up to the time of the death of F., there was a series of conveyances to and from F. and the grantees in the first deed or their wives, and of mortgages executed by them, containing substantially the same conditions except that in the latter mortgages the condition as to the payments to M. and E. were omitted. These mortgages, save the last one, were each satisfied by the mortgagee in their order. In an action to foreclose the mortgages containing the condition so omitted, wherein plaintiffs claimed as representatives of the interests of M. and E., the referee found that each subsequent mortgage was intended as a substitute for the preceding one and that F. received them upon the understanding and belief that the arrangement was testamentary in its character and that she retained possession and control of each mortgage until it was satisfied; also that neither M. nor E. had any knowledge or took any delivery of, or in any manner accepted or assented to any of the mortgages. *Held*, that no trusts in favor of M. and E. were created by the mortgages, but that the finding that the provisions for the payments to M. and E. were in their nature testamentary was proper, and so they were subject to alteration at any time by the assent of the parties to the mortgages. *Townsend v. Rackham*. 516

VENDOR AND PURCHASER.

See SALES.

VOTERS.

On the trial of an indictment for illegal registration these facts appeared: The defendant, at the time of his registration, was confined in the Tombs as a vagrant under a commitment for six months issued by one of the commissioners of charities and correction; he had been in that prison most of the time for about seven years under similar commitments. All of these commitments were issued upon his own application. When one commitment ran out he would immediately or soon after make application for another. He was employed in doing light work and errands, and while thus employed was permitted to go in and out of the prison. Defendant testified that he lived in the Tombs, and had for seven years; that he had no other home, and intended to make the prison his home as long as he could not get any other home. He registered in the election district which included the said prison. *Held*, that the defendant was at all times when at the Tombs a prisoner, and so he was not a resident in the district, and was properly found guilty of the offense charged. *People v. Cady*. 100

WAIVER.

1. A corporation as well as an individual may waive a constitutional or statutory provision in its favor or for its protection where it is exclusively a matter of private right and no consideration of public morals are involved, and having once done so it cannot subsequently invoke the protection of the provision. *Mayor, etc., v. Manhattan R. Co.* 1
2. Although said constitutional provision is of a public nature, where an act violative thereof is passed, bearing upon the private rights of individuals or corporations, the constitutional provision becomes as to them one enacted for their benefit, and they may waive the benefit thereof and consent to perform or submit to the requirements of the act, and when once such

waiver has been made and consent so given, and the party waiving and consenting has taken benefits granted by the act, such party is forever concluded thereby. *Id.*

3. Where in an action of ejectment plaintiff claimed title under a devise in a will by which a legacy was given to one of the defendants and made chargeable upon the real estate in question, *held*, that the legacy did not constitute a counterclaim; also, that plaintiff was not required to demur to the answer setting it up as a counterclaim in order to raise the question, nor did he, by replying, waive his right to take the objection. *Dinan v. Coneys.* 544

WAREHOUSING.

1. Defendant, a corporation authorized by its charter to receive goods for storage and issue warehouse receipts, which were made negotiable, by a by-law directed the warehouse receipts to be signed by its president or secretary. S., its president, applied to plaintiff for and obtained a personal loan, giving therefor his own note and as collateral security a warehouse receipt purporting to be issued by defendant, signed by him as president, acknowledging the receipt on storage for account of himself and subject to his order of a quantity of cotton. Plaintiff's officers knew when the loan was made that the person to whom it was made was defendant's president, and that the loan was a personal one. The loan was made on the faith of the collateral. S., in fact, had deposited no cotton with defendant. The note was not paid at maturity, and defendant, on demand made, refused to deliver the cotton or pay its value. In an action to recover damages, *held*, that the by-law did not clothe the president with authority to issue receipts to himself for cotton which in trust had been deposited by him; and so, that defendant was not estopped from denying the delivery of the cotton, and was not liable. *Bunk N. Y. Nat. Bkg. Assn. v. Am. D. & T. Co.* 559

2. *It seems*, that if the by-law had given the president general authority to issue receipts to himself for cotton actually deposited, defendant would have been liable to a *bona fide* holder for value of such a receipt, although the president had not in fact deposited any cotton. *Id.*

3. Also *held*, that the trial court properly refused to receive evidence of what S. said at the time when he procured the loan. *Id.*

WARRANTY.

— *Where an elevated railroad company has paid a percentage of its revenue to a municipal corporation for the use of its street, this does not amount to a warranty on the part of the municipality against the claims of abutting owners.*

See Mayor, etc., v. M. R. Co. 1

WATER WORKS COMPANIES.

1. The provision of that article of the Transportation Corporations Act relating to water works corporations (Art. 7, § 2, chap. 566, Laws of 1890) which authorizes such corporations when they have obtained the permit required by the article (§ 80) "to lay their water pipes in any street * * * of an adjoining town or village," is not limited to cases where an adjoining town or village intervenes between the source of supply and the town or village to be supplied, and it is necessary, in order to carry the water to the village or town granting the permit to lay the pipes in the streets of the adjoining town or village; but the authority may be exercised by such a corporation whenever it is necessary to lay the pipes in those streets in order to effectually and properly execute the purpose for which it was created. *Village Pelham Manor v. N. R. Water Co.* 532
2. In an action to restrain defendant, a water works company, organized to supply a village adjoining plaintiff, from using one of plaintiff's streets in which defend-

ant had laid its pipes without plaintiff's consent, it appeared that defendant laid its pipes in the street for the purpose of connecting two of its mains which terminated in "dead ends" near the boundary line of the two villages; this connection completed the circuit, added greatly to the pressure, and furnished running instead of stagnant water. The court found that in order to perform the purpose of its incorporation it was necessary for defendant to lay its pipes in the street in question. *Held*, that such a use of the street was within the scope of defendant's authority; and so, that the action was not maintainable. *Id.*

8. The franchise conferred upon a corporation organized under the act providing for the incorporation of water works companies (Chap. 737, Laws of 1873, amended by chap. 213, Laws of 1881) is not exclusive in its nature; it does not give to the company the exclusive and permanent right, during the term of the corporate charter, to purvey water to the town or village to supply which it was created, and neither the statute nor the constitutional provision prohibiting legislation impairing the obligation of contracts precludes the grant of a charter to another company, that has obtained the requisite assent of the municipal authorities, authorizing it to supply water from other sources to the inhabitants of the same town or village. *In re City of Brooklyn.* 596

4. By such a charter no rights are taken from the public or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. *Id.*

5. So, also, where a corporation organized under said act entered into a contract with the town for supplying it with water for a term of years, *held*, that in the absence of an express provision in the contract prohibiting it from so doing, the town was not precluded from making a like grant to or contract with another company for another or further sup-

ply, if the public needs required it. *Id.*

6. A corporation was organized under said act to supply the town of New Lots with water. Subsequently the town was annexed to the city of Brooklyn. By the Annexation Act (Chap. 835, Laws of 1886) the city was prohibited from supplying water to the territory included in the town until the expiration of the charter of the company or until the city should purchase or acquire its property. *Held*, that this act did not affirm or establish an exclusive right in the company to furnish water; that it did not operate upon it, but simply bore upon the power of the city, its purpose being to protect the company's franchise in case the city did not purchase the corporate property or acquire it by condemnation proceedings as authorized by the act. *Id.*

7. Also, *held*, that the provision of said act (§ 5) authorizing the city to acquire the property by proceedings *in invitum* was not violative of the constitutional provisions prohibiting the taking of private property except for a necessary public use, nor was it unconstitutional as authorizing the condemnation of property already devoted to a public use without designating any different or larger public use to which it was to be applied; that the public use for which it was required was sufficiently designated and was of a higher and wider scope than the use to which it was already devoted. *Id.*

8. All private property within the state is subject to the right of the legislature to appropriate it for a necessary and reasonable public use, a just compensation being provided to be paid therefor, and there is no distinction in this respect in favor of corporations whose franchises and operations impart to them a *quasi* public character, if in order the better to subserve the public use the appropriation is necessary. *Id.*

9. Accordingly, *held*, in proceedings under the act instituted by the

city to acquire the property and franchises of the water works company, that the commissioners of appraisal properly refused to consider that the company had a right to supply water so exclusive as to preserve it from rivalry or legislation, and properly valued the franchise upon the assumption that at present the company alone had the right publicly to purvey water to the territory formerly embraced in the town; but that the exclusiveness incident to its right might at any time be taken from it by the legislature or by the local authorities acting under legislation; in determining whether to do this neither would fail to have due regard to the past investments, risks and services of the company and the reasonably just expectations of those who invested money in its work. *Id.*

WILLS.

1. By the will of R., who died in 1887, his residuary estate was given to his executors in trust to pay the income thereof to his wife during her life. Upon her death said estate was given to beneficiaries named, subject to the payment of certain annuities specified, each given for the life of the annuitant. *Held*, that neither the annuities nor the remainders were presently taxable under the Collateral Inheritance Tax Act, in force at the time of the testator's death (Chap. 713, Laws of 1887); that as to the annuitants, they had no vested interest, and could take none until the death of the wife, and as to the remainders there was a contingency affecting them which rendered it impossible to ascertain their present fair and clear market value. *In re Roosevelt*. 120
2. W. by his will gave his real estate to his wife for life if she remained unmarried, if not, until her marriage, and upon her death or marriage he gave the said real estate to his and his wife's heirs, "their heirs and assigns forever, share and share alike." In an action for partition, brought after the death of the widow, *held*, that all of the

persons who at the time of the widow's death answered the description of heirs at law, either of the testator or of his widow, took an undivided interest in the lands as members of the same class *per capita* and not *per stirpes*. *Bisson v. W. S. R. R. Co.* 125

3. S. died, leaving a widow and brothers and sisters surviving, but no descendants; by his will he gave all of his property to his wife, "to have and to hold for her comfort and support * * * if she need the same during her natural life." In a subsequent provision he gave to a church society \$1,000 after the death of his wife, if there should be enough of the property left at that time. The widow re-married and executed to her husband a mortgage on the real estate of which S. died seized. She thereafter died. In an action brought by the heirs at law of S. to have the mortgage declared fraudulent and void and to have it canceled of record as a cloud on plaintiff's title, *held*, that the widow took under the will a life estate with power also to take and convert to her own use so much of the *corpus* of the estate as she should need for her comfort and support; that instead of selling she had the right to mortgage for the purposes specified, and the presumption would be that the mortgage was executed for such a purpose; that, therefore, the mortgage was not void upon its face and could be enforced by the mortgagee without the disclosure of extrinsic facts rendering it invalid, and the burden of showing these was upon those assailing it; and so, that the jurisdiction of a court of equity was properly invoked to cancel the apparent cloud upon the title. *Swarthout v. Ranier*. 499

See TRANSFER TAX ACT.

WITNESS.

1. The constitutional and statutory provisions (U. S. Const. art. 5; State Const. art. 1, § 6; Code Civ. Pro. § 837; Code Crim. Pro. § 10),

declaring that no person shall be compelled to testify against himself in any criminal case, protects a person called as a witness in any judicial or other proceeding against himself, or upon the trial of issues between others, from being compelled to disclose facts or circumstances that can be used against him as admissions tending to prove his connection with any criminal offense of which he may then or thereafter be charged, or the sources from or the means by which evidence of its commission or of his connection with it may be obtained. Nothing short of absolute immunity from prosecu-

tion can take the place of the privilege so given. *People ex rel. v. Forbes.* 219

2. The witness is himself in such a case the judge as to the effect of answers sought to be drawn from him, and if to his mind it may constitute a link in the chain of evidence sufficient to convict him or put him in jeopardy, if other facts are shown, he may remain silent, unless it be perfectly clear that he is mistaken and that the answer cannot possibly injure him, or tend in any way to subject him to the peril of prosecution. *Id.*

Exo.

